Rape in International Law

Fiona Elizabeth Tate

Submitted in partial fulfilment of the requirements of the Degree of Doctor of Philosophy

Queen Mary University of London

I, Fiona Elizabeth Tate, confirm that the research included within this thesis is my own work or that where it has been carried out in collaboration with, or supported by others, that this is duly acknowledged below and my contribution indicated. Previously published material is also acknowledged below.

I attest that I have exercised reasonable care to ensure that the work is original, and does not to the best of my knowledge break any UK law, infringe any third party's copyright or other Intellectual Property Right, or contain any confidential material.

I accept that the College has the right to use plagiarism detection software to check the electronic version of the thesis.

I confirm that this thesis has not been previously submitted for the award of a degree by this or any other university.

Signature: Fiona Elizabeth Tate

Date: 9 September 2019

Abstract

Crucial to the prosecution of crimes are the concepts that define them. This thesis critiques an emerging lexicon of rape in international law in order to lay the groundwork for the creation of new models. As part of this analysis, it will explore how rape as a war crime has been reconceptualised as a gender-neutral crime in modern international law by the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017), the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) and the International Criminal Court (ICC, 2002-present). It will argue that the current lexicon does not always accurately reflect the gender-neutral definitions constructed by these bodies. This problem is important because traditional heteronormative concepts of rape continue to influence prosecution outcomes in international law. The thesis examines primary sources, such as (inter)national law and trial transcripts, alongside (inter)disciplinary materials, including historical and philosophical texts. These sources affirm an ongoing relationship between traditional heteronormative understandings of rape and the lexicon used in modern international law. That relationship makes the application of such concepts unfit for purpose because they reinforce traditional ideas of the crime. For example, they frame men as permanent perpetrators of rape and women as agentless victims. In turn, female-perpetrated rape is mostly overlooked. Male-male rape is also largely ignored or prosecuted as something else, for example, torture.

Enabling the emergence of a more nuanced lexicon of rape will ensure that the terms used to categorise and prosecute rape reflect modern understandings of the crime in international law. Scholars, (international) non-governmental organisations and legal experts seeking to promote recognition of rape as a gender-neutral crime, which requires a challenge to traditional gender constructs, will benefit from a more informed analysis.

Acknowledgements

I would like to thank the staff at QMUL Library and the British Library for their help over the years. I have made extensive use of online available primary sources, especially those of the UN, and the archives of the ICTY, the ICTR and the ICC. I am grateful to those collating, digitising and maintaining those essential sources.

I am indebted to my supervisors Eric Heinze and Ruth Fletcher for their support and helpful advice over the years of my PhD. I have learned from them, particularly the former who has consistently challenged me intellectually and hugely improved my writing style.

Special thanks to my mentor and friend Judith Rowbotham for her invaluable counsel over the course of my studies as well as Matthew Glencross, Lorie Charlesworth, Michael Kandiah, Daniela Nadj, Donald Scannell, Peter Bartlett, and others, including fellow students and staff at QMUL. Your wisdom and guidance through this process has been instrumental.

I would also like to thank my family, my partner and my friends for their support and encouragement.

Table of Abbreviations

CAR	Central African Republic
CCAA	Central China Area Army
CEDAW	Convention on the Elimination of Discrimination against Women
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
EoC	Elements of Crimes
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEG	Informal Expert Group
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
INGO	International non-governmental organisation
IRMCT	International Residual Mechanism for Criminal Tribunals
IWHR	Institute for Women's Health and Rehabilitation
LSC	Ligue pour la solidarité Congolaise
MRND	National Republican Movement for Democracy and Development
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
SCSL	Special Court for Sierra Leone
UK	United Kingdom
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNCSW	United Nations Commission on the Status of Women
UNHCR	UN High Commissioner for Refugees
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
US	United States
WPP	Women Peacemakers Program
WWI	World War I
WWII	World War II

Table of Contents

Introduction

Crucial to the prosecution of crimes are the concepts that define them. Where there is confusion over how a crime is defined and categorised as an offence, clarification is required for there to be confidence in the justice process. The emerging lexicon of rape in international law will be critiqued from this perspective in order to lay the groundwork for the creation of new models. This analysis is necessary because rape is inconsistently prosecuted in international law. In cases of male-female rape, for example, it is commonplace for prosecutions to bring a charge only for an act of rape. On occasion, that charge is accompanied by another headline offence, such as an outrage upon human dignity or a crime of torture**.** Male-male rape, on the other hand, is regularly either overlooked by the prosecution when drawing up the charges, or is prosecuted as something other than rape – for example, torture. Female-perpetrated rape is largely ignored. The categorisation of rape as a form of sexual violence adds a further level of confusion, because the terms 'rape' and 'sexual violence' are at times used interchangeably, with little clarification of the reasoning behind this switching. These terminologies used to categorise rape in international law will be examined in this thesis to assess their impact on these differing approaches and trial outcomes. Whether and how they can be used in an equitable way to reflect modern gender-neutral understandings of rape in international law will be a key consideration for the thesis. The thesis will not provide a suggested reform programme for rape prosecutions in modern international law. Nor will it attempt to address problems associated with criminal prosecutions reforms in international law. It does not explore in detail how individual prosecution cases are constructed, including evidence-gathering, the role of witnesses and the detailed proceedings within the courts. Also excluded from the

thesis is consideration of rapes committed in post-conflict environments by peacekeepers and other personnel associated with international missions. Rape as a peacetime crime is not considered within this analysis, except peripherally when invoked to explain developments in international law. While there is an acknowledgement of the impact on international law of national criminal laws and legal processes, no assessment will be given on national jurisdictions, individually or collectively. The thesis limits itself to consideration of the current lexicon drawn on for conflict-perpetrated rape in international law (both past and present) utilising interdisciplinary perspectives for this purpose in order to lay robust foundations for further development in this area of law.

Historically women have commonly been identified in law as the possession of male relatives. Rape was a property crime committed against the man who formally or effectively possessed the woman. Male-male and female-perpetrated rape were excluded under this paradigm. In situations of armed conflict similar understandings prevailed. As 'spoils of war' or 'legitimate booty', the rape of conquered women was considered normal conduct. It was not until the eighteenth century, when international law started to emerge as a formal system, that rape in war was identified as an offence constituting a violation of either family or female honour.[1]

Such conceptualisations of rape are no longer considered fit for purpose. Yet, to date, a statutory definition of rape in international law remains absent.[2] Since the twentieth century, this lack of clarity has sparked much debate regarding how rape as a war crime

[1] *Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874*, available in D. Schindler and J. Toman, *The Laws of Armed Conflicts*, (Leiden: Martinus Nijhoff Publishers, 1988), pp.22-34; *The Laws of War on Land. Oxford, 9 September 1880*, available in Schindler and Toman, *The Laws of Armed Conflicts*, pp.36-48, (hereafter the *Oxford Manual*); *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907*, International Committee of the Red Cross: International Humanitarian Law Databases, (The Hague: International Conferences, 1907): https://ihl-databases.icrc.org/ihl/INTRO/195, (accessed 6 September 2019).

[2] To date, the UN Security Council (UNSC) for example has not introduced a resolution defining rape in armed conflict. See Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, (Leiden and Boston, MA: Martinus Nijhoff Publishers, 2012), p.145.

should be defined. Feminist theorists have played a critical part in the discussions over how to arrive at such a definition.[3] Driving the general feminist debates forward since the 1960s have been figures like Judith Butler, Joan Scott, Elaine Showalter and Dale Spender. The results have been extensive considerations of the nature and extent of women's oppression within patriarchal societies. Initially this was substantially undertaken using a predominantly Western perspective as well as providing what was essentially a national focus to these considerations.[4] Their influence on feminist scholarship across the theoretical spectrum, including law, is extensive, even seminal, but the challenge is that it is far from uniform in their pattern of effects.

This lack of uniformity of impact is particularly visible in the debates in law (particularly in the international sphere, the focus for this thesis) over the treatment of rape as a criminal offence. Feminist perspectives on debates about rape have been considered intrinsically radical in their challenge to established masculine thinking on law. In the last half of the twentieth century, radical feminist scholarship has, however, been identified as an aspect of feminist thinking alongside other labels, such as liberal feminism. Whether labelled as radical or any other kind of feminist scholarship, the work of figures like Butler have undoubtedly inspired and shaped the ongoing debates concerning rape. Yet, at the time of writing this thesis, there is no universal feminist stance about either what constitutes rape or how we can arrive at a robust legal definition for use in international law.

[3] R. Tong, 'Feminist Theory', in James D. Wright, *International Encyclopedia of the Social and Behavioral Sciences*, (University of North Carolina: Charlotte, NC, 2001), pp.5484-5491; P. England, 'Gender and Feminist Studies', in Wright, *International Encyclopedia of the Social and Behavioral Sciences*, pp.5910-5915.

[4] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, (Abingdon: Routledge, 2011); Joan W. Scott, 'Gender: A Useful Category of Historical Analysis', *American Historical Review*, (1986), 91(5), 1053-75; Dale Spender, *Man Made Language*, (Abingdon: Routledge, 1980).

There are some constants of agreement across feminist thought. Using the relationship between men, power and dominance as a starting point, both radical and liberal feminist theory (albeit to varying different degrees) identify rape as a fundamental detrimental aspect of patriarchy. Accordingly, rape is rooted in constructions of sexuality and gender, which are located within broader systems of male power. Rape, in other words, is 'not a deviation, but rather a deeply entrenched social practice that both expresses and reinforces far-reaching inequality and oppression of women in our society.'[5] It is an offence that damages both the individual victim and women as a whole for which 'all men in our society are collectively responsible'.[6] A core trope in radical feminism, however, insists that women cannot genuinely consent to sex with men. As such, they argue, consent should be excluded as an element of rape.[7]

The contribution of radical feminist theory with regards to rape in international law is invaluable. It has worked to recognise the harm committed by male perpetrators against female rape victims. But it is important to ask where male or non-binary victims and female-perpetrators of rape fit in to these debates. Liberal feminists, like myself, have taken up this issue but utilising a different perspective to that adopted by radical feminists. Liberal feminism, for example, places less emphasis on the powerlessness of women within patriarchal systems, seeking to recognise ways in which they have exercised agency, both past and present. Figures like Leonore Davidoff, Catherine Hall and Martha Nussbaum, in line with classic liberal thinking, have produced work shaped by their interest in reforms promoting an equality, of opportunity, of value and of respect between the genders in order to lessen the harmful affect of patriarchy.[8] As part of this approach,

[5] Igor Primorac, *Ethics and Sex*, (Jerusalem: The Hebrew University, 1998), p.497.
[6] Ibid
[7] Ibid.
[8] See for example, Leonore Davidoff, *Worlds Between: Historical Perspectives on Gender and Class*, (Blackwell: Polity Press, 1995); Catherine Hall, *White, Male and Middle Class: Explorations in Feminism*

liberal feminists, notably, have looked at the role that law and the legal process can play in advancing challenges to patriarchy. Of crucial interest to them has been studies exploring areas of activism such as legislating for equal pay, equal opportunities, and equality in the division of labour.

This ideology of equality is reflected elsewhere in liberal leaning scholarship**,** particularly with respect to rape. Experts such as Philip Rumney pick up on the feminist approach when they argue that it is important to frame rape not as a crime committed by men against women, but to identify rape as a gender-neutral attack on individual autonomy.[9] Focusing on gender similarities rather than differences, this theoretical approach assumes that if men and women are treated equally and are presented with similar opportunities, there will be no variance in attitudes or behaviour between genders.[10] As a dimension derived from an individualist form of feminist theory, it assumes that the choices and actions that each woman makes will contribute to their achieving equality.

From this point of view, achieving gender equality is not contingent on the restructure of society, because inequality is not profitably understood as being the result of systemic oppression within social hierarchy or structures.[11] As a general rule, the male sex (as traditionally and biologically understood) is, by feminist scholarship, identified as benefitting from the oppression of women. However, liberal feminism does not assume that as a social group, males are, or should be held universally accountable for the injustices experienced by women as a result of oppression, or blamed for upholding their position of privilege. There is instead potential for a recognition of individual nuance when

and History, (Blackwell: Polity Press, 2007); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach*, (Cambridge: Cambridge University Press, 2000).

[9] Philip Rumney, 'In Defence of Gender Neutrality Within Rape', *Seattle Journal for Social Justice*, (2007), 6(1), 481-526.

[10] Annette Davies, 'Liberal Feminism', in Albert J. Mills, Gabrielle Durepos and Elden Wiebe (eds), *Encyclopedia of Case Study Research*, (Los Angeles, LA: SAGE Publications, 2010), 526-7, p.526.

[11] Ibid.

exploring the roles of men in reaction to patriarchally-managed subjugation of women to masculine agendas.[12] Rather, emphasis is placed on socialisation, which creates different gender and sex roles. Any differences or variances in the attitudes or behaviour between genders are thought to be a result of such sex or gender role socialisation as opposed to any innate psychological or biological difference.[13] It is in this context that modern liberal feminists argue that rape needs to be categorised as a gender-neutral crime, certainly in international law, where the issue of consent in relation to conflict-perpetrated rape is generally deemed irrelevant.[14]

The impact of these feminist theoretical approaches on the modern legal landscape is far-reaching. Nation states no longer refer to rape as a gendered property crime perpetrated by men against women. Increasingly, states acknowledge rape as a form of gender-neutral interpersonal violence. This shift in thinking is reflected at the international level. In the aforementioned absence of a statutory definition of rape in international law, the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017), the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) and the International Criminal Court (ICC, 2002-present) have each defined rape as a gender-neutral crime committed against individuals in their own right.

The creation of these gender-neutral definitions of rape are ground-breaking, and core to establishing the offence as a grave crime in international law. Despite this development, cases of male-female, male-male and female-perpetrated rape remain inconsistently prosecuted in international law with little explanation for that lack of uniformity from these modern specialist international courts**.** This inconsistency has sustained the debates. As the literature review will reveal, feminist scholars as diverse as

[12] Ibid.
[13] Ibid.
[14] The reasons for this assumption about consent is explored in more detail in subsequent chapters.

Catharine MacKinnon, Ann Cahill, and Deborah Blatt have (if from different angles) sought to understand and explain this phenomenon by analysing a selection of the terms used to categorise rape in law. They have attempted to ascertain whether concepts like sexual violence, dignity and torture work to frame rape as a serious crime while still recognising the particular harm committed against female victims by male perpetrators. Yet little consideration has been given by them to the extent to which these terms perpetuate a gender-neutral understanding of the crime. This gap is the key focus of the thesis. Using what may broadly be termed as a liberal feminist lens, the thesis will analyse these concepts and how they are used to categorise or describe rape in international law. With a particular reference to its use in war crimes trials conducted by the ICTY, the ICTR and the ICC, it will explore how far these terms do work to frame rape as gender-neutral and provide recommendations regarding how these terms can be used more effectively by enabling a greater consensus over their use.

As part of this analysis, a critical consideration of the proceedings of these international courts is essential for any robust examination of the current strategies for the prosecution of rape in international law. Reference also needs to be made, as a frame for that exploration, to the key international body that implements and sustains international law in practice – the United Nations (UN, 1945-present). As the organisation that spearheaded the creation of the ICTY, the ICTR, and the ICC (among other international courts), attention will be paid to the extent to which its institutional culture has influenced the perpetuation of the traditional heteronormative understanding of rape in international law. Account will be taken of the cultural biases discernible in the women, peace and security resolutions implemented through the UN Security Council (UNSC, 1945).

A key challenge addressed in more detail in Chapter 1 (as well as being outlined in the Methodology section for this thesis) relates to usage by both commentators and the

courts of other terms such as 'conflict-related sexual violence', 'gender-based violence' and 'sexual exploitation and abuse'. These can signal, without explicit acknowledgment, an inclusion within a charge of acts of conflict-perpetrated rape.[15] Such swapping or conflation of language without clarification presents methodological problems when, for example, collecting and analysing quantitative and qualitative data. It can, as becomes plain in the body of the thesis, make it almost impossible to determine the nature of the type of specific offence that is being referenced.[16] It is in this context that the thesis uses conflict-perpetrated rape as its primary case study, to provide a more focused and clearer understanding of the problems relating to this area of the categorisation of crimes in international law. It will examine the challenges associated with using such broad and varied concepts when describing rape in order to lay the foundation for the categorisation of other individual crimes of a sexual nature to be examined in the future.

Literature Review

As the following critique of the academic debates surrounding rape in international law will reveal, these discussions have been driven substantially by feminist thinkers and commentators across a range of interested disciplines. Feminist scholarship, in the form of a will to comment critically on existing legal and political structures, can be dated back in Western tradition as far as ancient Greece, with the work of figures like Sappho.[17] In Book V of his *Republic*, Plato acknowledged Socrates' perspective that women have 'natural

[15] Kirsten Campbell, 'Producing Knowledge in the Field of Sexual Violence in Armed Conflict Research: Objects, Methods, Politics, and Gender Justice Methodology', *Social Politics: International Studies in Gender, State and Society*, (2018), 25(4), 469-95, p.470.
[16] Ibid.
[17] This interpretation of feminist scholarship is drawn from the definition of feminism used by Jane Rendall, relating to 'women who claimed for themselves the right to define their own place in society', Jane Rendall, *The Origins of Modern Feminism: Women in Britain, France and the United States 1780-1860*, (London: Macmillan, 1985), p.1.

capacities' equal to men for protecting and governing the state.[18] In 1405, Christine de Pizan in *The Book of the City of Ladies* challenged the misogyny of her day by promoting broader notions of womanhood and female competence for rule. Other early feminist figures include Hannah Woolley, Juana Inés de la Cruz, Marie Le Jars de Gournay, Anne Bradstreet, Francoise Poullain de la Barre and Margaret Cavendish, the Duchess of Newcastle-upon-Tyne.[19] Towards the end of the Enlightenment, the comments of Olympe de la Gouges and, later in the 1790s, Mary Wollstonecraft, forced other philosophers during the nineteenth century, including Jeremy Bentham, John Stuart Mill and August Bebel, to reflect upon women's rights in the context of democratic states.[20]

By the nineteenth and early twentieth century (at least in the West), feminism as a concept and organised movement had started to take shape, actively campaigning for equal rights and legal protections of women.[21] Originally primarily concerned with women's suffrage, particularly in the UK and the US, the feminist agenda snowballed. From the mid-twentieth century, feminist activists campaigned for recognition of their claims to equality of opportunity and treatment to be protected by law on, among other issues, worker and workplace rights (including maternity leave and equal pay) and reproductive rights (particularly contraception and prenatal care). One of the earliest and most sustained areas of campaigning has addressed laws dealing with protection from domestic violence, sexual harassment and rape.[22] As part of these developments, the relationship between patriarchy and the oppression of women attracted much comment from feminist writers

[18] Plato, *Republic*, (translated, John Llewelyn Davies and David James Vaughan), (Ware: Wordsworth Editions, 1996), Book V.
[19] Gerda Lerner, *The Creation of Feminist Consciousness from the Middle Ages to 1870*, (Oxford: Oxford University Press, 1993).
[20] Rendall, *The Origins of Modern Feminism*; Karen Offen, *European Feminisms 1780-1950: A* Political History, (Stanford, CA: Stanford University Press, 2000). For a wider discussion of the literature on Western feminism and its wider implications globally, see June Hannam, *Feminism*, (Oxon: Routledge, 2014).
[21] Rendall, *The Origins of Modern Feminism*.
[22] Stephanie Gilmore (ed.), *Feminist Coalitions. Historical Perspectives on Second Wave Feminism in the United States*, (Champaign, IL: University of Illinois Press, 2008).

across the spectrum, including Susan Brownmiller, Simone de Beauvoir, Betty Friedan, Florynce Kennedy, bell hooks (also known as Gloria Jean Watkins) and Germaine Greer.[23] Their writings focused on the role of women in society from perspectives that revealed the cultural inequalities endemic to established gender norms. Alongside Kennedy, other writers, notably Kimberlé Crenshaw with her concept of intersectionality, ensured that the significance of race within those cultural inequalities formed a major part of the debates.[24] As part of second-wave feminism, these writers and other activists ensured that the traditional roles played by women in society, and the attached cultural values associated with gender identities, were consistently and extensively challenged. Their contribution has seen feminist thought achieve a greater impact than ever before, including on legal thinking.[25]

Initially, the focus of feminist critiques on continuing legal inequalities was domestic. Even where comparative work was done, that too focused on national comparisons. Indeed, up to the 1990s, little critical attention was paid to gender inequalities within the domain of international law, substantially because (almost quintessentially) this type of law was seen as pertaining to public and so, by default, masculine dimensions such as trade, politics and diplomacy. This contextualisation helps to explain why, writing in 1994, Hilary Charlesworth described the feminist analysis of international law as being 'at a very early stage.'[26] Most international lawyers, she pointed out, 'even those with a critical bent' have largely 'regarded their discipline as gender-

[23] See for example, Susan Brownmiller, *Against Our Will: Men, Women and Rape*, (London: Secker and Warburg, 1975); Simone de Beauvoir, *The Second Sex*, (translated, Constance Board and Sheila Malovany Chevallier); (London: Vintage Books, 1993); Betty Friedan, *The Feminine Mystique*, (New York, NY: Penguin Books, 2010); Florynce Kennedy, *Color Me Flo: May Hard Life and Good Times*, (New Jersey, NJ: Prentice-Hall, 1976); bell hooks, *Talking Back: Thinking Feminist, Thinking Black*, (Boston, MA: South End Press, 1989); Germaine Greer, *The Female Eunuch*, (New York, NY: McGraw-Hill, 1971).
[24] Kimberlé Crenshaw, *On Intersectionality: The Seminal Essays*, (New York, NY: New Press, 2012).
[25] Sally Ann Drucker, 'Betty Friedan: The Three Waves of Feminism', Ohio Humanities, 27 April 2018: http://www.ohiohumanities.org/betty-friedan-the-three-waves-of-feminism/, (accessed 1 July 2019).
[26] Hilary Charlesworth, 'Feminist Critiques Of International Law and Their Critics', *Third World Legal Studies*, (1995), 13(1), 1-16, p.1.

free'.[27] This perspective has endured, she insists, 'long after feminist critiques of other areas of law have underlined the pervasiveness of gendered assumptions in national legal systems'.[28] Charlesworth identified that, in national systems, the law utilises a public/private distinction when interpreting actions, placing the focus on actors because, she argues, 'it is not the activity which characterizes the public and the private, but rather the actor'.[29] Even more than for such national systems, the discussions of international law and its application must include a recognition of this dimension in the shape of a focus on the public/private dichotomy, and so acknowledging its potential for impacts on women's legal identity and rights.[30] Charlesworth, for example, makes the point that the incorporation of human rights considerations in international law post-1945 has 'altered one set of boundaries' between the public and the private, enabling international law to 'address violations of designated individual and group rights'.[31]

Qualifying this point, she insists that this advance does not challenge the 'deeper public/private dichotomy' in law, which remains not only based on gender but also is set by agendas which focus on male fears about actions and initiatives which could threaten male dominance and female subordination.[32] Her argument is that violence against women is, in particular, not properly addressed in international law because of its focus on '"public" actions by the state'.[33] Charlesworth identifies that the international legal definition of torture invokes the public nature of such actions,[34] proceeding to argue that

[27] Ibid.
[28] Ibid.
[29] Hilary Charlesworth, ''What Are "Women's International Human Rights"?', in Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives*, (Philadelphia, PA: University of Pennsylvania Press, 1994), 58-84, p.69.
[30] H. Charlesworth 'Feminist Critiques', p.1.
[31] H. Charlesworth, 'Women's International Human Rights', p.71
[32] Ibid.
[33] Ibid, p.72.
[34] This definition establishes that '[i]t must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity', Ibid.

what amounts to violence as torture for women happens also in the private sphere.[35] Earlier, in 1991, Charlesworth, alongside Christine Chinkin and Shelley Wright, had reflected on the persistence of the public/private dichotomy as providing the possible reason for international law resisting feminist analysis. Their intention to challenge this lacuna was encouraged by the reality that, thanks to the ending of the Cold War (1947-1991), a new era was dawning for international law. The challenge, as these feminist scholars have underlined, was to refute the idea that, in primarily concerning itself with an idea of public law, the international dimension was still held not to 'have any particular impact on women'.[36] Scholars such as Charlesworth and Chinkin pointed critically to the accompanying assumption that 'issues of sovereignty, territory, use of force and state responsibility' were topics that were considered to be 'gender free' when it came to their application to 'the abstract entities of states'.[37] The arguments of such scholarship, in summary, were to the effect that it was only when international law began to be 'considered directly [as] relevant to individuals' that things would change.[38] They pointed, in particular, to human rights law in insisting that it was possible to begin to develop 'some specifically feminist perspectives on international law'.[39]

Dianne Otto provides further insight into the growing feminist focus on international law. She explains that in the early twentieth century, in the aftermath of WWI (1914-1918), the focus for feminists and women's international peace groups had been on efforts to support and inform the development of public international law. This was seen as being in the best interests of maintaining peace by the settlement of inter-state tensions without resorting to conflict, given that war was identified as having a particularly

[35] Ibid.
[36] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law', *American Journal of International Law*, (1991), 85(4), 613-45, p.614.
[37] Ibid.
[38] Ibid.
[39] Ibid.

damaging impact on women and families. These feminists had encouraged developments of international institutions (notably the League of Nations (1920-1946) and later the UN) in 'the hope that they would provide a means to resolve international disputes peacefully.'[40] Their efforts had led to some advancements, including the development of provisions for greater protection of civilians in armed conflict, the implementation of anti-trafficking treaties as well as international labour organisation conventions regarding matters of women's employment. This involvement with international law was for the most part uncritical. International law was understood, Otto explains, 'as a hopeful site for feminist engagement', providing a pathway to improve the lives of women and enabling peace.[41]

It was not until the late 1980s that this perspective began to change. Feminist legal scholarship became increasingly critical of the complacency they perceived in international law, in that it had become clear to them that it was 'largely impervious to feminist concerns'.[42] They found that women's issues were 'marginalized by specialist institutions and instruments' that related to international law, and that consequently, women were 'still being treated protectively rather than as full rights-bearing subjects of the law.'[43] In reaction to global events during the 1990s and early 2000s, the gaze of feminist scholarship increasingly fell on war and international law, and particularly on the impact of conflict-affected environments on women. In the light of events during this period, feminist commentators like Chinkin voiced their concerns that there seemed no likelihood that conflict-perpetrated rape would receive proper attention in international law, on the basis of past patterns in war crimes proceedings. As pointed out by Rhonda

[40] Dianne Otto, 'Feminist Approaches to International Law', Oxford Bibliographies, (2012, last reviewed 2016): https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0055.xml, (accessed 2 July 2020).
[41] Ibid.
[42] Ibid.
[43] Ibid.

Copelon in the context of events in 1995, the rape of women in war had been accorded a low priority previously. It had, even in the aftermath of WWII (1939-1945), only 'drawn occasional and short-lived international attention.'[44] She describes how, rather than being perceived as a headline offence, rape, historically, had merely 'come to light as part of the competing diplomacies of war, illustrating the viciousness of the conqueror or the innocence of the conquered.'[45] When war was over, rape was 'comfortably filed away as a mere and inevitable "by-product," a matter of poor discipline, the inevitable bad behavior of soldiers revved up, needy and briefly "out of control".'[46]

Around the same time, Judith Gardam looked more broadly at the gendered nature of law in relation to armed conflict.[47] Seeking to use an objective lens, by reference to how an alien might perceive the contradictions, hypocrisies and assumptions contained within the rules and laws of armed conflict, she concluded that 'the law of armed conflict perpetuates… all the assumptions of Western femininity and masculinity that permeate law in general.'[48] In the laws of armed conflict, the female subject, she explains, is 'assumed to have certain "natural" characteristics such as modesty and weakness, which help to constitute her honour'.[49] The provisions in international law which address or deal with her are based on these characteristics. She is also assumed, Gardam continues, to be the 'natural prey of men'.[50] Her honour, therefore, 'must be protected from men's "natural"' uncontrollable lust.[51] The male subject, on the other hand, 'is the combatant and

[44] Rhonda Copelon, 'Gendered War Crimes: Reconceptualizing Rape in Time of War', in Roger Peters, *Women's Rights, Human Rights: International Feminist Perspectives*, (London and New York, NY: Routledge, 1995), 197-214, p.197.
[45] Ibid.
[46] Ibid.
[47] Judith Gardam, 'An alien's encounter with the law of armed conflict', in Ngaire Naffine and Rosemary J. Owens, *Sexing the Subject of Law*, (London: Sweet and Maxwell, 1997), 233-50.
[48] Ibid, p.249.
[49] Ibid.
[50] Ibid.
[51] Ibid.

has a "natural" affinity for arms'.[52] Though generally held to be honourable, he is 'prone to behaviour that is regarded as inimical to an honourable game, such as rape', especially in conflict.[53]

Interestingly for this thesis, while Gardam agrees that there are 'two biological body types envisaged as natural by the law of armed conflict', she is less convinced that they are both presumed to be heterosexual.[54] She summarises that the woman is 'perceived only in terms of her body as a sexual object for men and as a reproducer', and so is framed as heterosexual.[55] In contrast, the man, as the combatant, 'does not appear to have a sexed body' in the laws of armed conflict because 'he is not protected from indecent assault'.[56] As such, man's sexuality 'is far more equivocal in the law of armed conflict than that of the woman.'[57]

In seeking to move the discussion forward by providing reflection on the impact of these competing feminist perspectives, Otto explains that while 'feminism's basic commitment can be described as the struggle to realize women's equality', there are many different branches of feminism.[58] These, at different times and in response to different events, have been used by feminist thinkers 'to inform international legal theories and practices'.[59] She adds a reminder that 'women's "equality"' is perceived by some of these strands of thought 'to be an inadequate aspiration.'[60] In this light, feminist approaches to international law, she reflects, 'have always fallen under a very broad umbrella, resulting in dynamic engagements with the law and its fraternity, as well as passionate internal

[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Otto, 'Feminist Approaches to International Law'.
[59] Ibid.
[60] Ibid.

critique and self-reflection.'[61] Structural and postcolonial feminists, for example, have focused on the normative and institutional structures of international law, 'finding them deeply committed to masculinist and imperial power and therefore in need of significant reconstruction.'[62] The latter group in particular, alongside critical race feminist theorists, has played a significant role in the field of law that grew from European as well as patriarchal origins. Feminist debates concerning conceptions of gender and sexuality present another challenge to the established gaze of international law in terms of what it needs to address. The outcome, in terms of both those debates and the responses to them, has seen the emergence of a series of competing agendas that are often contradictory but are also argued for, in terms of the priorities they should assume, with considerable passion. That passion, however, in itself diminishes the chance of agreement between the competing perspectives in terms evolving strategies for managing these priorities. How to define and then proceed to prosecute conflict-perpetrated rape constitutes one area where the consequences have been particularly problematic in practice, as this literature review and subsequent chapters, combine to reveal.

The origins of a key aspect of the international debate on prosecution of conflict-perpetrated rape as a crime lie, in part, in the seminal contribution of the philosopher and sociologist, Michel Foucault. The theoretical challenges that he presented to feminist theory during the 1960s and 1970s focused on the relationship between the body, power, sexuality and the law. In particular, his claim that rape should be categorised as a form of violence as opposed to sexual violence provoked hostility from second-wave feminists across the board. Indeed, it continues to serve as a bone of contention amongst many feminists broadly. Specifically in relation to the considerations of this thesis, that

[61] Ibid.
[62] Ibid.

contention has affected their interchanges with other international (legal) scholars on the topic.[63] Leading feminist theorists such as Cahill, MacKinnon, Monique Plaza and Winifred Woodhull have challenged the validity of his conclusions, arguing that Foucault does not appreciate how gender, power, forces, and the law are interconnected.[64]

The challenge for this thesis is that these debates largely centre on the persistence in them of a traditional identification of women as (certainly quantitatively, on the basis of the records) the primary victims of rape. Though different perspectives are assumed in those debates about the implications of that identification, one significant consequence has been the equal persistence of a belief that this quantitative primacy entitles them to some privileged form of special consideration. This position manifests itself particularly when defining the basis on which prosecutions for conflict-perpetrated rape should be brought. Notably, such a combination of thinking sets up a widespread expectation that women's experiences as rape victims should be used to define the nature of the experience for all when consideration is made of how rape is prosecuted in any criminal justice process. This perspective is challenged in Chapter 5, in particular, where the impact of Foucault's thinking in shaping the theoretical approaches to rape in international law as well as the reflective commentary on the work of the international courts will be explored. As touched upon earlier, conflict-perpetrated rape is recognised as a serious gender-neutral crime in modern international law. A key question is whether, by focusing strictly on the limitations or advantages of Foucault's desexualisation theory with regards to female victims, the

[63] See for example, Ann J. Cahill, 'Foucault, Rape and the Construction of the Feminine Body', *Hypatia,* (2000), 15(1), 43-63, p.43.
[64] Ann J. Cahill, *Rethinking Rape*, (Ithaca and London: Cornell University Press, 2001); Cahill, 'Foucault, Rape and the Construction of the Feminine Body'; Catharine A. MacKinnon, *Towards a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989), pp.172-3; Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, (New Haven, CT: Yale University Press, 1979); Monique Plaza, 'Our Costs and Their Benefits', in Diana Leonard and Lisa Adkins (eds), *Sex in Question: French Materialist Feminism*, (London and Bristol, PA: Taylor & Francis, 2005), 178-89; Winifred Woodhull, 'Sexuality, Power, and the Question of Rape', in Irene Diamond and Lee Quinby (eds), *Feminism and Foucault: Reflections on Resistance*, (Boston, MA: Northeastern University Press, 1988), 167-76.

discussion has remained circular and overly narrow. Even where feminists like Cahill attempt to broaden the debate beyond women's victimisation, a wider scope to the discussion is largely absent. This lack is rooted in the constant referencing back to the essentially binary perspective used by Foucault, alongside the reality that he also privileges a Western perspective and assumes its universalism. Female-perpetrated rape continues to be largely overlooked, while male-male rape is only mentioned in passing.[65]

For Sandesh Sivakumaran, a significant problem is that even where male-male rape victims are acknowledged, their experience is regularly explained in similar terms which echo those used for the female experience. It is a perspective that is recognised, even insisted on, by a number of feminist scholars. Plaza, for example, holds that when 'men rape women, it is… because they are socially women'.[66] She claims that when a man is raped, he is also raped as a woman.[67] Radical feminist legal scholar and activist, MacKinnon describes how men who are raped are 'stripped of their social status as men. They are feminized: *made to serve the function and play the role customarily assigned to women as men's social inferiors*.'[68]

Experts like Philipp Schulz, Augusta DelZotto and Adam Jones have attempted to challenge the persistence of the cultural assumptions supporting this perspective in order to widen the discussion.[69] They argue that describing male-male rape in terms of being homosexualised or femininised is inherently harmful,[70] because it reinforces damaging

[65] Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', *European Journal of International Law*, (2007), 18(2), 253-76, p.253.
[66] Monique Plaza, 'Our Damages and Their Compensation. Rape: The Will Not to Know of Michel Foucault', *Feminist Issues*, (1981), 1(2), 25-35, p.29.
[67] Ibid, p.28.
[68] Catharine A. MacKinnon, 'Oncale v. Sundowner Offshore Services, Inc., 96-568, Amici Curiae Brief in Support of Petitioner', *UCLA Women's Law Journal*, (1997), 8(1), 9-46, p.19, (emphasis added).
[69] Augusta DelZotto and Adam Jones, 'Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?', unpublished paper presented to the Annual Convention of the International Studies Association, New Orleans, LA, 23-27 March 2002: http://adamjones.freeservers.com/malerape.htm, (accessed 24 August 2019); Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.271.
[70] A trope in British nineteenth century pornography is that rape has the capacity, through its breaking down of the 'normal' barriers of feminine physical reticence on sexual matters, to turn a woman into a

concepts about heterosexuality and masculinities.[71] This thesis will, in subsequent chapters, explore how persistently such understandings remain entrenched in feminist discourse on conflict-perpetrated rape. In critiquing the categorisation of conflict-perpetrated rape as a crime of torture in international law, for example, a number of feminist scholars largely focus on the extent to which this development works to benefit female rape victims. Blatt, for example, considers how far this characterisation acknowledges the way rape is used as a gendered political tactic in order coerce or intimidate women.[72] MacKinnon, on the other hand, looks at whether it would be more beneficial to characterise *all* rapes of women as torture, regardless of the contexts of perpetration or prosecution.[73] Presenting an alternative perspective, Karen Engle suggests that describing rape as torture works to create a situation where 'women are not capable of not being victimized by the rapes.'[74] Central to these debates is persistence of a trope where both rape and torture are identified as being inherently gendered. Little attention is given in these discussions which might reflect on why, on the basis of evidence from the international courts, there is a clear inconsistency in prosecution strategies for male-female rape in terms of whether or not to identify it as a form of torture. This dimension becomes more challenging when we consider that male-male rape can be described simply as a crime of torture, with details of the sexual dimension obscured. Equally the challenge of how to prosecute female-perpetrated rape is largely ignored under this heading. These

being eager for sexual intercourse and physical masculine dominance, including flagellation. The same holds true for homosexual rape, as *The Romance of Lust* (1873-76) underlines.

[71] Philipp Schulz, 'Displacement from gendered personhood: sexual violence and masculinities in northern Uganda', *International Affairs*, (2018), 94(5), 1101-19, p.1105.

[72] See for example, Deborah Blatt, 'Recognizing Rape as a Method of Torture', *Review of Law and Social Change*, (1992), 19(821), 821-65, p.854.

[73] Catharine A. MacKinnon, *Are Women Human?: And Other International Dialogues*, (Cambridge, MA and London: Belknap Press of Harvard University Press, 2006), p.17. See also, Clare McGlynn, 'Rape, torture and the European Convention on Human Rights', *International and Comparative Law Quarterly*, (2009), 58(3), 565-95, p.573.

[74] Karen Engle, 'Feminism and Its (DIS)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', *American Journal of International Law*, (2005), 99(4), 778-816, p.813.

amount to unresolved conversations, which this thesis will address in Chapter 7 exploring the invocation of rape as torture, to promote a better understanding of the extent to which such debates actually obstruct the development of a consensus over how to define rape as a crime in modern international law.

In recognising the dilemma that is posed by use of different descriptors for rape, it cannot be ignored that women remain the normative targets for this crime. Nevertheless, if a robust and meaningful examination of how to prosecute rape is to be achieved for international law, then the broader dimensions of the crime must be considered. In line with Eric Heinze's even-handedness theory, male-male rape and female-perpetrated rape cannot continue to be side-lined if the scholarship is to move forward and advance a genuinely gender-neutral lexicon of rape in modern international law. It is important to rethink the current pro-binary and quintessentially Western traditions in the ongoing scholarly discourse in ways that can include wider issues and perspectives. Without changes, a feminist hostility to such a development risks continuing the ghettoization of women as the only 'real' victims of rape, thereby dismissing the validity of male-male rape in its own right while also failing to recognise female-perpetrated rape victims. Substantiation for this point is partially provided in what have become the well-worn discussions on the gendered nature of rape, which largely differ only with the fresh incidents included, rather than as a result of a new approach to the material. Work on female-perpetrated or male-male rape continues to be largely excluded from the wider trope.[75] The approaches discussed in the ongoing debates centre on how to identify and so

[75] This point is underlined by the shape of the #MeToo movement, which emerged in 2018. Amongst the critiques of the impact of the movement, claims have been made that male victims have been overlooked. Zoe Greenberg, 'What Happens to #MeToo When a Feminist Is the Accused?', *The New York Times*, 13 August 2018:
https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html, (accessed 14 August 2020). Anna North, 'When the accused is a woman: a #MeToo story's lessons on gender and power', *Vox*, 14 August 2018: https://www.vox.com/2018/8/14/17688144/nyu-me-too-movement-sexual-harassment-avital-ronell, (accessed 26 March 2019). Returning at this point to a consideration of gender as a broad headline term, the previous sub-sections discussing key terms have revealed that gender identities

define rape in modern international law. When combined with evidence on prosecutions for rape in the international courts, this focus underlines the necessity for taking an interdisciplinary approach to expand the lens used to draw conclusions about the nature of a lexicon. This will be explained in further detail in the Methodology section below.

Methodology

Central to the execution of any study is a coherent and reasoned methodological approach that both takes account of and responds to the existing literature, and revisits the relevant evidence. The following section will provide an outline of the different methodologies drawn on to develop my thesis approach, giving the rationale behind my choices and emphasis.

(a) Qualitative and Quantitative Research

The terms 'qualitative' and 'quantitative' refer to two different types of research methods, which are invoked either explicitly or implicitly by scholars in their analyses of collected data. The former, Aikaterini Argyrou explains, looks at 'socially constructed facts', while the latter examines evidence that is independent and measurable.[76] Historically, quantitative data collection was the favoured approach in identifying judicial decision patterns. Since the 1990s, with the growing prominence of the socio-legal approach to legal history, qualitative legal research has become increasingly popular, especially

and assigned roles can differ both over time and between societies and that developments in social thinking about the nature of gender presents an enduring challenge, as current considerations of the non-binary in gender underlines. The descriptive or defining language employed consistently invokes legacies of ambiguity. When drawn on by theorists and practitioners, these descriptors and constructions are significantly influenced by an individual's age, ethnicity, culture, and sexuality. The assumptions underlying the terms explored above are re-examined using explicitly gendered terminologies favoured by more recent gender scholarship, Tis starts with gender essentialism, which represents a key challenge for how gender can be understood within this thesis

[76] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research', *Utrecht Law Review*, (2017), 13(3), 95-113, p.98.

amongst experts looking to uncover information relating to decision-making processes.[77] This thesis uses a qualitative format for data analysis, while acknowledging the value of the quantitative approach in areas where robust data can be cited.

In focusing on what Jelke Boesten refers to as 'conflict-related sexual violence', including rape, an examination is provided of the unease between these different methodological approaches and how both quantitative and qualitative data can inform policy development and call for justice.[78] Responding to the demands for international criminal accountability for conflict-related sexual violence, she claims that researchers are looking for ways to improve our understanding and knowledge of its prevalence as an aspect of conflict.[79] For Boesten, such research is vital in determining whether there are patterns which can be identified in the perpetration of sexual violence in conflict-related situations which, if found, can be used to secure accountability for such crimes. If we persist simply to state that rape in conflict is inevitable or endemic, she continues, then it perpetuates the fallacy that rape is related to men's natural aggressive behaviour and, in turn, is something to be expected.[80] This thesis responds to her challenge to see whether understanding these trends through collecting and analysing statistical evidence can work to both dispel such myths and improve intervention and accountability.[81]

The thesis recognises that a problem with this approach is, as Boesten points out, finding sufficiently reliable or accurate statistical data in (post-)conflict environments. Finding robust evidence provides a challenge affecting rape prosecutions in peaceful democratic states where there are established institutions and mechanisms which might be

[77] Ibid.
[78] Jelke Boesten, 'Of exceptions and continuities: theory and methodology in research on conflict-related sexual violence', *International Feminist Journal of Politics*, (2017), 19(4), 506-19, p.506.
[79] Ibid, p.508.
[80] Ibid.
[81] Ibid.

expected to generate robust relevant data.[82] Thus, regardless of the wider context, many of the obstacles and difficulties in obtaining or accessing reliable data are similar. In peacetime or in conflict environments, most data relating to sexual and gender-based violence that is not anecdotal derives from police reports or those made by local authority bodies, such as healthcare providers and social workers.[83] In (post-)conflict scenarios such testimony is still likely to be filtered through such bodies. A commonality is that the number of victims reporting such offences is low, and most statisticians accept that this reportage is unlikely to reflect anything more than a small percentage of actual incidents of rape. In this vein, Boesten asks '[w]hich part of the population reports, and which does not? How do class, race, family structures, marital status, perpetrator profile, intention, stigma, shame and/or age influence whether a victim-survivor reports or recounts their experiences or not?'[84]

These factors, Boesten writes, add a further complication when analysing and applying collected data in a meaningful way. The risk in adopting a quantitative approach, therefore, is not only that of dramatically underrepresenting instances of sexual violence, but that a percentage of victim types (based on gender, race, ethnicity, for example) would be underrepresented and others overrepresented.[85] Language, as this thesis will demonstrate, presents an additional challenge to employing a quantitative approach. For example, how terms such as 'rape', 'sexual violence' and 'gender-based violence' are understood or defined, 'what words are used to refer to certain experiences and who can be victim or perpetrator influences both data collection as well as its interpretation.'[86]

Because of these issues, Boesten insists that it is nearly impossible to compare data

[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid, pp.508-9.

from different states and bodies, even with advances in data collection techniques and analysis methodology.[87] It is on this basis that she argues that if quantitative data is to be used in a reliable way, it must examined in conjunction with qualitative contextual information.[88] Focusing primarily on quantifiable data as part of policy development without the contextual and historical background exposes any analysis to the danger of statistical anomaly, and so distorting the conclusions reached. She points out that 'there are a set of epistemological assumptions underlying a focus on numerical evidence' that are incompatible with qualitative research.[89]

Substantiating her argument that despite its apparent value, the quantitative approach is inherently vulnerable to flaws, Boesten refers to the work of a range of different types of experts, including Trisha Greenhalgh and Jill Russell, who reflect on the use of quantitative data in biomedical research.[90] In their article 'Evidence-Based Policymaking: A Critique', they argue that 'measuring the social world and translating this into comparable numbers and indicators represents a specific positivist worldview in which context, history and subjectivity lose ground'.[91] Boesten also considers the observations of Sally Engle Merry,[92] who claims that focus on 'quantifiable indicators for policy has moved from national governance' (in terms of health, for example) 'and economic analysis to development and global governance.'[93] She points out that 'composite indicators to monitor human rights performance',[94] for example, 'promote quick comparisons of countries along a scale but ignores the specificity of various human

[87] Ibid, p.509.
[88] Ibid.
[89] Ibid.
[90] Ibid; Trisha Greenhalgh and Jill Russell, 'Evidence-Based Policymaking: A Critique', *Perspectives in Biology and Medicine*, (2009), 52(2), 304-18.
[91] Boesten, 'Of exceptions and continuities', p.509.
[92] Sally Engle Merry, 'Measuring the World: Indicators, Human Rights and Global Governance', *Current Anthropology*, (2011), 52(3), 239-43.
[93] Boesten, 'Of exceptions and continuities', p.509.
[94] Ibid.

rights and conceals particular violations'.[95] Measurements and indicators, she writes, often overlook an array of factors that shape our universe,[96] and 'have embedded theories and values that shape apparently objective information and influence decisions'.[97]

Boesten raises crucial points regarding the challenges associated with quantitative data use, particularly in the context of rape in modern international law. It is in light of these critiques that I decided that quantitative methods will not be directly used in this thesis. Instead, statistical data collected by other experts will, at times, be referenced to demonstrate the prevalence of rape in (post-)conflict. To contextualise such data in ways that can make it relevant to the analysis in this thesis, qualitative research will be invoked as a framing device throughout. Typically employed to enable an understanding of the impact or meaning a research topic or subject has or gives to a phenomenon, as opposed to authenticating or generating theories retrieved from scholarly literature, this research method largely relies on reasoning based on facts and data, which are categorised into patterns and themes.[98] It can be generally used for explanatory or exploratory purposes, and lead to causal or descriptive conclusions.[99] Particularly in law, it can be used to expose legal realities or discourses, revealing the limited parameters of organisational action, insider views or perspectives as well as experiences of the law.[100]

Already used extensively within feminist scholarship on sexual violence,[101] this thesis applies qualitative research approaches in order to assess a selection of the terms used to categorise and prosecute rape in modern international law. Relevant primary sources in the shape of trial literature, and policy documents and statements from key

[95] Merry, 'Measuring the World', p.87.
[96] Boesten, 'Of exceptions and continuities', p.510.
[97] Merry, 'Measuring the World', p.85.
[98] Argyrou, 'Making the Case for Case Studies in Empirical Legal Research', p.99.
[99] Ibid.
[100] Ibid.
[101] Jelke Boesten, 'Revisiting Methodologies and Approaches in Researching Sexual Violence in Conflict', *Social Politics: International Studies in Gender, State and Society*, (2018), 25(4), 457-68, p.462.

bodies, notably the UN, have been identified for the contemporary post-1990 period in particular. The pertinent secondary literature has been synthesised according to the themes identified by the research questions for this thesis. This exercise will advance the critical enquiries and will bring together primary and secondary material.[102]

Examining primary sources, including national and international law as well as trial transcripts, this thesis explores how understandings of what constitutes rape in international law have changed. It argues that, if there is to be an advance towards a more robust understanding of how to improve prosecution practices for rape in international courts, questions need to be raised on a number of fronts. In particular, the relationship between traditional heteronormative understandings of conflict-related rape and the terms used to categorise such offences needs to be revisited. To inflect the conclusions reached on this basis, questions will also be asked about how far that relationship makes the application of such concepts unfit for purpose because they reinforce traditional ideas of the crime. Do these concepts so influence practice that, for example, they undermine the status of rape as a serious crime in international law? Do they promote a reality where men are framed as permanent perpetrators of rape and women as agentless victims? Linked to such debates, further consideration needs to be given to the implications for victims of male-male rape, where their experience is often likened to that of the female victim. Does the primacy of this understanding not only damage a male victim's sense of masculine identity, but also work to reinforce the social stigma of rape by making it something pertaining to homosexuality, which in itself is often seen as having a feminine character? To what extent are female-perpetrators of rape factored into this construct? Approaches

[102] Dvora Yanow and Peregrine Schwartz-Shea (eds), *Interpretation and Method: Empirical Research Methods and the Interpretative Turn*, (London: Routledge, 2015), especially Steven Maynard-Moody and Michael Musheno, 'Stories for Research', 338-52; 'Introduction', Samo Bardutsky and Elaine Fahey (eds.) *Framing the Subjects and Objects of EU Law,* (Cheltenham: Edward Elgar, 2017), 1-30.

which involve a range of other disciplines besides law are used in this thesis to help advance solutions and establish a robust methodology.

(b) Interdisciplinary Approach

Interdisciplinary scholarship is central to the methodology for this thesis. This term represents the use of two or more distinct academic disciplines in order to draw on information and knowledge from other fields. There is a need for caution from scholars when employing such an approach to research, because it is difficult to balance the competing agendas of different disciplines in ways that provide robust analysis-based conclusions. It is owing to these challenges that Sanne Taekema and Bart van Klink, for example, contest the usefulness of such research, arguing that academic disciplines often have polarising research processes or different conceptualisations of a subject matter.[103] As a result, any scholarly conclusions drawn from such research are, they maintain, potentially compromised. This thesis, in line with arguments put forward by Argyrou, instead insists that inspiration can be taken from other academic fields so long as a consciousness exists of their individual agendas. Such awareness includes taking account of the differing assumptions made by different disciplines when setting up data-gathering strategies as well as the priorities for evidence interpretation. A valid interdisciplinary approach which prioritises the legal dimension but allows for it to be inflected by the considerations of another discipline, such as history, can be taken when 'the response to the problem defined in the research question "is not predicated solely on the concrete body of legal rules"'.[104] A further caveat to interdisciplinarity is provided when an enquiry

[103] Sanne Taekema and Bart van Klink, 'On the border: Limits and Possibilities of Interdisciplinary Research', in Sanne Taekema and Bart van Klink (eds), *Law and Method, Interdisciplinary Research into Law*, (Tübingen: Mohr Siebeck, 2011), 7-32, pp.8-9; Argyrou, 'Making the Case for Case Studies in Empirical Legal Research', p.96.
[104] Argyrou, 'Making the Case for Case Studies in Empirical Legal Research', p.96.

concerns 'a hermeneutical quest for a legal meaning and/or interpretation.'[105] What is implicit here is a warning that quantitative approaches to data are particularly problematic when utilising an interdisciplinary methodology, because it is not always possible to marry the different data collection and analytical processes between disciplines. This point further reinforces use of a methodology invoking qualitative approaches to the sources for this thesis.

Adopting an interdisciplinary approach through employing a socio-legal perspective has been identified as essential for this thesis because it takes account of the cultural and social history which frames legal developments over time.[106] Socio-legal research has been traditionally used to bridge the divide between sociology and law, and economics and social policy.[107] However, there is increasing level of interaction between law and those disciplines traditionally located within the arts and humanities.[108] For the purposes of examining the lexicon of rape in international law, the policy and economic aspect of socio-legal studies is of little relevance. As such, the 'socio' dimension, which includes cultural studies,[109] is significant because of the wider socio-cultural issues associated with conflict-perpetrated rape and the terms used to categorise the offence in international law. This dimension is of critical importance as it permits an analysis that looks beyond the narrow parameters of legal studies.

In order to determine the impact of the terms used to categorise rape in international law have on prosecution outcomes, legal history (invoked from a perspective generally labelled as historico-legal studies) is equally essential. Focusing on 'events of the past that

[105] Ibid.
[106] Lorie Charlesworth, 'On historical contextualisation: Some critical socio-legal reflections', *Crimes and Misdemeanours*, (2007), 1(1), 1-40.
[107] Ibid, p.4.
[108] Ibid.
[109] Dermot Feenan, 'Exploring the 'Socio' of Socio-Legal Studies', in Dermot Feenan (ed.), *Exploring the 'Socio' of Socio-Legal Studies*, (Hampshire: Palgrave Macmillan, 2013), 3-19.

pertain to all facets of the law', historico-legal scholarship analyses certain laws, legal bodies, institutions and individuals who work or operate within the legal system, and the sway of law and the legal process on society and its attitudes.[110] Lorie Charlesworth explains that historical contextualisation is a distinctive feature of socio-legal research. Many, she explains, 'if not all, examples of socio-legal research inevitably presuppose at least certain aspects of knowledge of the past.'[111] Using the examination of law and discrimination as an example, Charlesworth points out that researchers arguing for progressive legal intervention, which expands 'the rights of historically disadvantaged groups' rarely directly refer to historical sources.[112] Yet their analyses typically accept that such groups have historically been discriminated against.[113] This emphasis on historical contextualisation is key to understanding the perspectives of such groups and their attitudes towards rape as a crime.

Even so, it is important to engage with questions that have been raised regarding the relevance of historico-legal research as part of socio-legal scholarship.[114] The argument is made that because a phenomenon of the modern age can be summarised in terms of growing cultural instability of or within communities as a result of rapid cultural, social, and technological change, all continuity with the past is disrupted. Historical research is therefore rendered obsolete where present realities of crimes, like rape, are examined.[115]

In response, this thesis invokes Charlesworth's point that it is seldom possible to draw a clear line between the past and present, and that sound socio-legal scholarship recognises the continuing impact of historically-rooted cultural traditions. As she reflects,

[110] The Free Dictionary: https://legal-dictionary.thefreedictionary.com/Legal+History, (accessed 25 March 2019).
[111] L. Charlesworth, 'On historical contextualisation', p.6.
[112] Ibid, pp.6-7.
[113] Ibid.
[114] Ibid, p.7.
[115] Ibid.

the state of any research topic remains 'encrusted with the legacy of all that it is perceived as having become over a sustained period of time.'[116] Even experts that do not employ a strict historical research approach identify the need to reflect on developments within their research subject.[117] Likewise, lawyers, with their reliance on precedence, often attempt to reconstruct historical events during trial proceedings.[118] In modern international war crimes prosecutions, for example, the legacy of previous war crimes tribunals, notably the IMT and the IMTFE have been repeatedly referenced.[119]

The perspective taken by this thesis is that the process of examining law or legislation in action cannot overlook the historical. Taking a topic or event as the subject of socio-legal, or another form of research, requires historical analysis in order to understand how far key values, beliefs, and ideas underpinning the research subject have come into being.[120] The effect of shifting contexts as well as 'the resulting lessons of the power of contingency, provisionality and openness to transformation', Charlesworth explains, 'are positively enhanced by historical contextualisation'.[121] This occurs in ways that question recognised socio-legal narratives and other accounts of legal subjects.[122]

Robert Gordon is another scholar who explicitly recognises that legal history can be used to critique those ideologies that support current state of affairs:

> [Anything] that produces disturbances in the field – that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such as those of the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a

[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid, pp.7-8.
[120] Ibid, p.8.
[121] Ibid
[122] Ibid

> very different present – in short any approach that unsettles the familiar strategies that we use to tame the past in order to normalise the present.[123]

On this basis, failure to examine the emergence of rape as a war crime in international law without providing any historical context for this development would constitute poor scholarship.

Use of a feminist methodology will work to mesh these different research approaches effectively. Elizabeth Grosz has pointed out that generally a feminist analysis is, on the one hand, a response or reaction to the 'overwhelming masculinity of privileged and historically dominant knowledges, acting as a kind of counterweight to the imbalances resulting from the male monopoly of the production and reception of knowledges'.[124] On the other it is 'a response to the political goals of feminist struggles'.[125]

In law, feminists, broadly speaking, have doubts about leading legal methods and are critical of them for representing, what Lydia Cloughtery identifies as, 'male power structures, considering only a male view of the world, and ignoring the female view'.[126] Attempting to fill this gap, legal feminist scholars typically look to 'incorporate the experience of women and women's voices into jurisprudence.'[127] This methodological approach is key to this thesis because it not only recognises the 'injustices in society that are borne out across the lives of women', but it continually raises new questions about the law, encouraging ongoing dialogue or conversations, in order to move theory forward.[128] Established mainstream methodological techniques typically favour research conclusions

---

[123] Robert W. Gordon, 'Foreword: The Arrival of Critical Historicism', *Stanford Law Review*, (1997), 49, 1023-29, pp.1023-4; ibid, p.8.
[124] Elizabeth Grosz, 'A note on essentialism and difference', in Sneja Gunew (ed.), *Feminist Knowledge: Critique and Construct*, (London and New York: Routledge), p.332.
[125] Ibid.
[126] Lydia A. Cloughtery, *Feminist Legal Methods and the First Amendment Defense to Sexual Harassment*, *Nebraska Law Review*, (1996), 75(1), 2-26, p.2.
[127] Yavuz Selim Alkan, 'Feminist legal methods: Theoretical assumptions, advantages, and potential problems', University of Leicester School of Law Research Paper No. 13-12 (2013), 1-12, p.2.
[128] Gina Heathcote, 'Feminist Politics And The Use Of Force: Theorising Feminist Action And Security Council Resolution 1325', *Socio-legal Review*, (2011), (7), 23-43, p.24.

that either exclude or marginalise the experiences and perspectives of women. Such practices also promote definitions of minority groups utilising binary and Western perspectives on race, ethnicity or class.[129] Feminist methodologies are more equipped to alert users to the need to be conscious of the dangers of such essentialist approaches, diminishing the tendency to fall back on a prescriptive approach.[130] As Caroline Ramazanoglu points out, the choices made by feminist methodologies 'are particularly powerful in the politics and practices of knowledge production', because they promote a more considered understanding of the implications of taking for granted a relevant presumption or stereotype.[131] Gina Heathcote points out that 'the compulsion towards new ways of understanding, new ways of listening and new ways of constructing and imagining the law, within feminist legal scholarship' represents what she dubs 'the life of feminist thinking'.[132]

Addressing the main focus of feminist thinking, Heathcote points to three questions:

1) How a theory and a political process can speak for all women without losing respect for the diversity of individuals (the question of essentialism);
2) How to articulate women's disadvantage and the everyday harm women encounter without negating women's agency (the question of victim versus agency);

[129] See for example, Joshua S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa*, (Cambridge: Cambridge University Press, 2003), especially pp.359-67 which takes a gender essentialist perspective throughout.
[130] Caroline Ramazanoglu with Janet Holland, *Feminist Methodology. Challenges and Choices*, (London: Sage, 2002), p.2.
[131] Ibid, p.3.
[132] Heathcote, 'Feminist Politics And The Use Of Force', p.24.

3) How to develop, without losing the strength of feminists' real world action or losing the sophistication of the theoretical understandings of the limits and strengths of feminist methods (the question of praxis).[133]

These questions will underpin the analysis provided in this thesis, in order to provide a fresh reflection on the terms used to categorise conflict-perpetrated rape in international law.

Demonstrating a sensitivity towards diversity of opinion across a range of factors, including the historical time dimension and its impact on presentations of topics, such as age, class, sexual orientation, culture, race and ethnicity, is key to this study.[134] A conscious inclusion of these different perspectives can ensure that important variances in the debates among women and feminists are not obscured or ignored.[135] Here, it is important to acknowledge my own identity. As a white Western feminist, I benefit from certain privileges because of my ethnicity and place of residency, which do not necessarily reflect the realities or experiences of other groups, particularly those of non-Western states. To avoid privileging my own perspective, I pursue a similar type of feminist politics to Heathcote, whereby I 'actively and consciously (and always with more to discover)' attempt 'to make political space for those who do not have the privilege to speak in the same forums as I have.'[136] While feminism does consider 'oppressive practices that operate against white, privileged women', there is a danger that the end conclusions 'may readjust the allocation of privilege, but fail… to reconstruct the social and legal significance of gender' as it affects non-white women or other minority groups.[137]

[133] Ibid.
[134] Deborah L. Rhode, 'Feminist Critical Theories', *Stanford Law Review*, (1990), 42(3), 617-38, p.622.
[135] Katherine T. Bartlett, 'Feminist Legal Methods', *Harvard Law Review*, (1990), 103, 829-88, p.835.
[136] Gina Heathcote, *Feminist Dialogues on International Law: Successes, Tensions, Futures*, (Oxford: Oxford University Press, 2019), p.2.
[137] Bartlett, 'Feminist Legal Methods', p.834.

As part of this methodological approach, it is important to note and understand tensions within feminist scholarship 'as an integral and necessary part of feminist methodologies'.[138] As indicated earlier, '[t]here is no single school of feminist jurisprudence.' [139] Charlesworth, Chinkin and Wright suggest that '[m]ost feminists would agree that a diversity of voices is not only valuable,' but crucial, and that the 'search for, or belief in, one view, one voice is unlikely to capture the reality of women's experience or gender inequality.' [140] My starting point is that the idea of '"[o]ne true story"' suggests that an alternative story cannot be told with equal validity, favouring 'the permanent partiality of feminist inquiry.'[141] This thesis accepts the need to be alert to the significance of variances in feminist debates surrounding the identification of rape as a gender-neutral crime in modern international law. Echoing Heathcote, it recognises the importance, most specifically, of analysing the law in a way that does 'not collapse back into accounts of women as victims and marked as externally vulnerable'.[142] Acknowledging that there can be a 'split between feminist message[s]' relating to the experiences of women and feminist methodologies theorising about expertise and knowledge within the law is equally critical, and will play a pivotal role in this thesis.[143]

(c) Case Study Approach

As already indicated, a case study approach has been chosen as part of this analysis. Robert Yin, a leading figure in case study development, defines a 'case study' as a means of investigating 'a contemporary phenomenon in-depth within its real-life context, especially

[138] Heathcote, *Feminist Dialogues on International Law*, p.1.
[139] H. Charlesworth *et al.*, 'Feminist Approaches to International Law', p.613.
[140] Ibid.
[141] Ibid.
[142] Heathcote, *Feminist Dialogues on International Law*, p.3.
[143] Ibid, p.4. See also Hilary Charlesworth, 'Feminist Methods in International Law', *American Journal of International Law*, (1999), 93(2), 379-94 for this aspect of the discussion on methodology.

when the boundaries between the phenomenon and the context are not clearly evident'.[144] It refers to the critical analysis of a particular subject, involving an individual, a group or a social experiment or phenomenon, in order to determine and evaluate patterns of behaviour or outcomes. Case study research is typically used in academic scholarship to generalise information learned from one subject to another, so as to find a common dominator that can be linked to the failure or success of a case. Reports, interviews and court cases, among others, can be used as a case study to collect information.[145]

For Argyrou, case study research lacks objectivity, rigour and precision.[146] Yin, on the other hand, argues that it is useful tool in conducting in-depth analysis where 'why or how-based' research questions are asked, as this thesis does. It delivers detailed information relating to events, activities, processes and situations concerning the behaviour of people or a phenomenon.[147] Lisa Webley explains how, in law, case study research is used to identify the extent to which legislation is (mis)applied, observed or rejected and its impact on other areas, such as policy and legal making processes and court decisions.[148] Expanding on this point, Terry Hutchinson argues that case study research works to explore inconsistent legal outcomes, explain differences or reasons behind certain legal processes, something which undoubtedly characterises the realities of rape prosecutions in the international courts.[149]

---

[144] Robert K. Yin, *Case Study Research: Design and Methods*, (Thousand Oaks, CA and London: SAGE, 2009), p.18.
[145] uslegal.com: https://definitions.uslegal.com/c/case-study/, (accessed 24 March 2019).
[146] See, for example, Argyrou, 'Making the Case for Case Studies in Empirical Legal Research', pp.99-100.
[147] Ibid, p.100.
[148] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research', in Peter Cane and Herbert M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research*, (Oxford: Oxford University Press, 2010), 926-50, pp.939-40; Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research', *Law and Method*, (2016), (3), 1-21; Argyrou, 'Making the Case for Case Studies in Empirical Legal Research', p.100.
[149] Terry C. M. Hutchinson, Research and Writing in Law (Lawbook Co.: Sydney, 2002); Argyrou, 'Making the Case for Case Studies in Empirical Legal Research', p.101.

It is on this basis that case studies are used throughout this analysis, starting with the main subject of this thesis – rape in international law. The focus of this discussion is on rape committed in war, because it is only under such circumstances that international law is invoked. Other incidents of rape remain under national jurisdictions.[150] However, rather than use the older terminology such as 'rape in war' reference will instead be made throughout to 'conflict-perpetrated rape', as reflecting a more current usage for rape in international law.[151]

In order to provide a sense of focus, this thesis looks at the terms used to categorise only that crime. It is hoped that by using rape as the primary case study, this analysis can address the specific problems affecting the categorisation of one act, rather than generally examine multiple offenses under the umbrella of one overarching label. This approach is not without its difficulties. As touched upon earlier, Kirsten Campbell acknowledges how 'rape' and other terms such as 'gender-based violence', 'conflict-related sexual violence', 'sexual violence', and 'sexual exploitation and abuse' are often used interchangeably in scholarship.[152] This conflation of terminology, amounting to a lack of precision, she argues, poses numerous challenges for a case study approach. Indeed, scholars often generalise between and within empirical studies, and use different methods of data collection for comparison between studies.[153] Care will need to be taken to ascertain when an incident which could be categorised specifically as rape is being discussed under another headline such as sexual violence.[154]

[150] It is worth noting that the impact of national legal processes on international law is expressed not just through an influence on emerging definitions, but through the existence of hybrid courts such as the Extraordinary Chamber in the Courts of Cambodia (ECCC).
[151] At times, rape in war is used, because it is more historically appropriate to the context, however.
[152] Campbell, 'Producing Knowledge in the Field of Sexual Violence in Armed Conflict Research', p.470.
[153] Ibid.
[154] Ibid.

Other case studies include the ICTY, the ICTR and the ICC – the first modern specialist international criminal courts to provide their own definitions of rape and prosecute alleged perpetrators in international law. These organs are important because even where other international courts such as the Extraordinary Chambers in the Courts of Cambodia (ECCC, 1997-present) and the Special Court for Sierra Leone (SCSL, 2002-13) have addressed rape as a war crime in international law, they have referred to and built on the precedence set by the ICTY, the ICTR and the ICC. Examining the methodology used by these bodies shows not only their thought processes behind conceptualising rape as a serious crime in international law, but their shortcomings. For example, the failure of these tribunals to consider wider factors like the extent to which the terms used to categorise rape reflect traditional understandings of the crime.

In terms of their function as case studies, the ICTY, the ICTR and the ICC have all referenced various national and international legislation in developing their respective definitions of rape. As such, this thesis draws, if indirectly, on the work reflecting both on different international bodies as well as on individual state engagement with those bodies. They provide the exemplars within the wider case studies enabling exploration of the problems associated with terms used to categorise rape. Here, it is worth reiterating the point raised by Charlesworth about the significance of acknowledging the legacy of what a legal concept such as rape has been in the past when understanding the current realities of a topic.[155] In line with this reflection, the point of origin for the analysis pursued by this thesis invokes a longer chronological perspective to underline the entrenched nature of the traditions contextualising national and international law.

[155] L. Charlesworth, 'On historical contextualisation', p.7.

Thesis Structure

Prior to the twentieth century, developments in laws of war, particularly with regards to rape, were limited in their scope. Though rape was – at least from a legal perspective – no longer regarded as (by default) part of the 'spoils of war', it continued to evade prosecution. Even in the aftermath of WWII, conflict-perpetrated rape was largely overlooked, despite its identification as a violation of female or family honour in international law. It was not until the 1990s, thanks in part to the media reportage of the Yugoslavian and Rwandan wars, that the legal landscape shifted. Theodor Meron remarks that '[t]here is nothing new in atrocities or starvation. What is new is the role of the media. Instant reporting from the field has resulted in rapid sensitization of public opinion, greatly reducing the time lapse between the perpetration of such tragedies and responses to them.'[156] Such coverage resulted in an increase in the demand for international courts and tribunals to be established to prosecute and punish not just states (via war reparations),[157] but also individual perpetrators accused of crimes perpetrated in conflict. Following sustained pressure from international/non-governmental organisations (I/NGOs) and activists, rape was (eventually) added, among other crimes, to the list of charges prosecuted by the ICTY and the ICTR. As part of this development, these tribunals defined rape as a gender-neutral crime committed against an individual in their own right – something which was later picked up by the ICC. One important question for this thesis is whether conflict-perpetrated rape has, and is, being prosecuted in ways that reflect these gender-neutral definitions. Here, it will be essential to consider the role was played in prosecution outcomes by the terms chosen in various cases to categorise rape.

[156] Theodor Meron, 'Rape as a Crime Under International Humanitarian Law', *American Journal of International Law*, 87(3), (1993), 424-28, p.424.
[157] Mark Lewis, *The Birth of the New Justice. The Internationalisation of Crime and Punishment, 1919-1950*, (Oxford: Oxford University Press, 2014), pp.67-8; 179-80.

In order to set up this analysis, Chapter 1 surveys the terminology used to frame and push forward the debates identified in the literature review. It examines key concepts, such as hegemonic masculinity and patriarchy, to understand how far, and in what ways, they have shaped both historic and contemporary understandings of rape in international law. This examination will enable a better appreciation of the extent to which historical understandings of rape have retained a persistent cultural power, which will be reflected on throughout the analysis presented in this thesis. Building on this survey, the evolution of rape as a crime in international law between ancient times and WWII is examined in Chapter 2, in order to establish the residues of the past. It explores the origins of international law and how rape as a war crime, in line with hegemonic masculinity, was traditionally understood as a violation of female or family honour. The emergence of modern international law from the setting-up of the UN onwards is analysed in Chapter 3. Its focus is on the mechanisms introduced and inspired by that body, in particular the ICTY, the ICTR and the ICC, and the legacy they established for the prosecution of rape by subsequent specialist international courts. Taking this analysis further, Chapter 4 explores the issues associated with legal terminology. It examines the different definitions of rape created by the ICTY, the ICTR and the ICC in further detail as well as reflecting on trial outcomes. It shows how traditional (hegemonic masculine) conceptualisations of the crime continue to retain salience, affecting how male-female/male-male/female-perpetrated rape have been categorised differently under the headings of sexual violence, torture and dignity. Chapters 5-7 considers the extent to which these terms used to categorise rape in international law perpetuate such traditional understandings of rape and, in turn, examine their usefulness as part of a lexicon of rape in modern international law. Starting with the term ‘sexual violence’, Chapter 5 explores the challenges associated with this concept. It considers how far this term reinforces existing and damaging traditional

gender-constructs and asks whether the term ‘gender-based violence’ offers an alternative. Chapter 6 moves beyond this focus to consider the value of utilising the concept of dignity, given its ongoing connection with the hegemonic masculine concept of ‘honour’. Chapter 7 examines the term ‘torture’. Reflecting on the ways in which male-female and male-male rape have been prosecuted differently under this heading by these specialist courts, this chapter focuses on the debates concerning the private/public dichotomy in international law and its impact on rape prosecutions in international law. Returning to a focus on the application of theoretical concepts, Chapter 8 looks at the role of institutional power and authority, namely the UN. As the organisation that played a pivotal role in the creation of the ICTY, the ICTR and the ICC, the UN certainly influenced institutional and cultural framework of these organs. It is important, then, to examine the UN’s attitude towards and response to conflict-perpetrated rape in the shape of its UN Security Council Resolutions (UNSCR). This analysis will determine the extent and significance of the cultural messages disseminated by the UN on these specialist international criminal courts. An Appendix is provided outlining the definitions created by the ICTY, the ICTR and the ICC as well as selected cases discussed in this thesis, including the charges brought and the outcomes, to support the discussions in the thesis chapters.

Chapter 1

Key Concepts

As the Introduction to this thesis revealed, feminist scholarship, among other researchers across the academic spectrum, has used various concepts to examine conflict-perpetrated rape in international law in both a historical and contemporary context. In order to critique the terms used to categorise rape in international law, it is important to establish an understanding of these broader concepts, because they reveal not only how rape in international war crimes trials is understood, but also the underlying assumptions and expectations on which such usage rests.

The concepts used to contextualise rape in international law typically invoke powerful underlying assumptions about the criminal nature of rape. The challenge then becomes understanding how these assumptions affects usage of the different terms employed, which include 'gender-based violence', 'conflict-related sexual violence', and 'sexual exploitation and abuse'. Typically, they have a different value or meaning within different areas of scholarship as well as in different cultures. Other key concepts used in the debates are also in need of clarification, notably 'gender', 'patriarchy' and 'hegemonic masculinity'. This chapter will therefore examine these terms, taking account of their interdisciplinary applications, as a basis for their role in the analyses provided in the remainder of the thesis. It will also establish what constitutes a lexicon in law and conflict-perpetrated rape for the purposes of this thesis.

(a) A Lexicon in Law

A 'lexicon' refers to '[a] stock of terms used in a particular profession, subject, or style'.[1] The words we use to describe or contextualise an act, situation or event are important, especially in law. In criminal law, for example, they should address the *mens rea* (the criminal mind-set or intent of the alleged perpetrator)[2] and the *actus reus* ('the commission of an act prohibited in law') of a crime.[3] Over time, understandings of what constitutes an offence as well as its classification can change. These developments should be reflected in the terms used to categorise a crime if the law is to remain relevant. The challenge in law is that specialist legal terms used to categorise an offence are often vague, making it unclear when crime constitutes a specific harm and what that categorisation effectively represents.

Throughout history, scholars have attempted to provide their own lexicons for use in various areas of law. In 1892, John Wharton in *Law Lexicon* (also advertised as a *Dictionary of Jurisprudence*) provided not just literal translations of the Latin maxims used in law but their explanatory meanings.[4] More recently, Sarah Wilson explored the lexicon of financial crime as part of her wider analysis of white collar crime.[5] Susan Marks and Andrew Clapham proposed their own lexicon in international human rights law, arguing that such a tool is essential to secure 'emancipatory change' within international human rights law.[6] Reflecting on the practical realities of constructing an international lexicon at

[1] *The Free Dictionary*: https://www.thefreedictionary.com/lexicon, (accessed 2 August 2019).
[2] For a broad discussion on *mens rea* and *actus reus*, see Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis*, (Copenhagen: Springer, 2014).
[3] Ibid, p.8.
[4] John Wharton, *Forming an Epitome of the Law of England; and Containing Full Explanations of Technical Terms and Phrases Thereof, Both Ancient and Modern. Including the Various Legal Terms Used in Commercial Business; Together with a Translation of Latin Law Maxims, and Selected Titles from the Civil, Scotch, and Indian Law*, (London: Stevens and Sons, limited, 1892).
[5] Sarah Wilson, *The Origins of Modern Financial Crime: Historical Foundations and Current problems in Britain*, (Abington: Routledge SOLON, 2014).
[6] Susan Marks and Andrew Clapham, *International Human Rights Lexicon*, (Oxford: Oxford University Press, 2005).

the end of colonialism, Marks and Clapham turned to Edward Saïd's work on orientalism and the messages conveyed by imperial terminologies for their colonies. Saïd explained that if the existing axes of ascendancy were to be successfully reconceptualised at the end of colonialism, similar language to that used by the dominant group or power would need to be employed.[7] If international law is to reflect and respect a broad range of belief systems, then the dominant powers must ensure the language used is accessible to all.

(b) Conflict-Perpetrated Rape

To date, no consensus exists between states on what, in law, constitutes rape. Legal definitions of the crime differ between states. They are still continuously debated but without achieving agreement. This lack is due to the gendered interpretation of the concept of rape.[8] Some state penal codes, including those of England and Wales and Pakistan, define rape as penetration of the vagina by the penis by force, including threat or intimidation.[9] Others, such as the Penal Code of Bosnia and Herzegovina, indicate that force can be directed at a third person. Providing clarification, Ch XIX, Article 203 states '[w]hoever coerces another by force or by threat of immediate attack upon his life or limb, or the life or limb of someone close to that person, to sexual intercourse or an equivalent sexual act, shall be punished by imprisonment for a term between one and ten years'.[10] In other words, if an individual is forced to have sex to prevent a relative's murder, for example, this can constitute rape. Some national jurisdictions have omitted the element of

[7] Edward W. Saïd, *Reflections On Exile: And Other Literary And Cultural Essays*, (London: Granta Books, 2001).
[8] Experts continue to debate what should constitute rape both domestically and internationally. See for example, Estelle B. Freedman, *Redefining Rape*, (London and Cambridge, MA: Harvard University Press, 2013); Clare McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives*, (Oxford and New York, NY: Routledge, 2010).
[9] For example, the England and Wales Sexual Offences Act 2003 states that rape is committed if the perpetrator 'intentionally penetrates the vagina, anus or mouth of another person' with his penis. See also Section 375 of the Pakistani Penal Code (1860, amended 2006).
[10] See the Penal Code of Bosnia and Herzegovina (2003, amended 2013), Ch XIX, Article 203.

penetration completely, which can make judgments about the gravity of incidents unclear.[11] This point relates to the wider dimension of sexual assault, as in some societies where people are often packed into tight spaces, such as overcrowded transport, fondling or *frottage* might also count as an assault (or battery in the classical sense of non-consensual touching) although it is non-penetrative. Arguably, such acts, even if admitted as assaults or battery, are overall too trifling and deflect attention from graver incidents. Recognising instances where penetration is forced upon oneself rather than upon someone else also presents an issue. For example, an adult woman coercing an under-age male into sex or even an adult male forcing penetration by and not upon another male. There are inconsistencies in the legal recognition of rape as a gender-neutral crime[12] and the use of objects to rape an individual.[13] Forced oral sex also provides a challenge for determining what constitutes rape, as does the issue of consent.[14] Valerie Oosterveld, for example, points out that a focus on non-consent is the core or central concern of many of domestic legislators.[15]

The *mens rea* and *actus reus* involved presents a test for jurisprudential thinking about rape. As Susan Caringella points out, in the US, on the one hand 'the overwhelming majority of contemporary rape statutes contain no explicit *mens rea* requirement', which works to reinforce the idea that *mens rea* is not important in defences against rape. The grounds for making such claims rest in the theory that excluding this element should make

[11] German Criminal Code (1998, amended 2013) Section 177.
[12] For a discussion regarding female-perpetrated crimes in war, see Karen Engle, 'Feminism and Its (DIS)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', *American Journal of International Law*, (2005), 99(4), 778-816, p.812.
[13] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Antwerpen and Oxford: Intersentia, 2005), p.112.
[14] Ibid. See the England and Wales Sexual Offences Act 2003.
[15] Valerie Oosterveld, 'The Influence of Domestic Legal Traditions on the Gender Jurisprudence of International Criminal Tribunals', *Cambridge Journal of International and Comparative Law*, (2013), 2(4), 825-49, pp.831-2.

it easier to prove either intention or recklessness.[16] On the other, there is evidence from those same US courts which suggests that the emphasis on force and consent could provide, in practice, a basis for claiming that the *mens rea* remain significant in rape prosecutions.[17] There seems, to date, to be no sign of a consensus being achieved on this point of contention.

In the absence of a statutory definition of rape in international law, the ICTY, the ICTR and the ICC sought to create their own definitions of conflict-perpetrated rape for their prosecution purposes (Appendix 1). Inevitably, the court personnel responsible for evolving such definitions looked to national jurisdictions, where the ambiguities mentioned above, both between and within states, ensured there was no easy path towards constructing a single workable definition. The proceedings in these, constituting the first modern specialist international courts to define, categorise and prosecute rape as a war crime in international law, provide the focus of this thesis.[18] Key to this analysis are the similarities and differences shared between these definitions, namely how they each frame rape as gender-neutral. The application of these definitions by these respective bodies will also be examined. Particular attention will be paid to how those definitions were applied and whether any patterns emerge where rape (by and against either gender) is, or is not, prosecuted as a different type of offence. Whether this pattern reinforces traditional heteronormative understandings of rape will also be considered.

[16] Susan Caringella, *Addressing Rape Reform in Law and Practice*, (New York, NY: Columbia University Press, 2009), p.139. It also removes the idea of pre-meditation which, in a crime, is generally held to enhance its seriousness.
[17] Ibid. See also Joan McGregor, *Is It Rape: on acquaintance rape and taking women's consent seriously*, (Abingdon: Routledge, 2017).
[18] Though other courts have since been established, for example, the Extraordinary Chambers in the Courts of Cambodia (ECCC, 1997-present) and the Special Court for Sierra Leone (SCSL, 2002-2013), their work both relate to and build on the precedent established by the ICTY, the ICTR and the ICC.

(c) Heteronormative Rape

The term 'heteronormative' is intrinsically gendered, and denotes or relates 'to a world view that promotes heterosexuality as the normal or preferred sexual orientation.'[19] Rape has typically been understood, both legally and culturally, as a crime perpetrated solely by men and only against women, a reality which also relates to patriarchy (defined below). The term 'heteronormative rape' is employed within this thesis to signal the traditional understanding of rape as an expression of heterosexuality, which by default identifies men as perpetrators and women as victims.

For this thesis, the challenge is that such fixed ideas and understandings about the nature of victims, perpetrators and conflict works to narrow our understanding of what constitutes rape. One point which this thesis will reflect on is whether it will be, in future, possible for legal thinking and practitioners genuinely to move beyond this understanding, with the implications that might have for shifting broader cultural mind-sets.

(d) Patriarchy

Originally used to refer to a 'system of society or government by fathers or elder males of the community',[20] the term 'patriarchy' is another intrinsically gendered term which has evolved to describe '[a] system of society or government in which men hold the power and women are largely excluded from it.'[21] Sir Robert Filmer's *Patriarcha: Or The Natural Power of Kings* (1680) explored long-standing beliefs encapsulated in the Fourth of the Ten Commandments about the 'natural' authority of fathers over their families and households (women and children). He employed such beliefs to provide a philosophical

[19] *Lexico*: https://www.lexico.com/en/definition/heteronormative, (accessed 2 August 2019).
[20] From Old French *patriarche* meaning 'one of the Old Testament fathers' and the Latin term '*patriarkhia*', from the Greek *patriarkhes* meaning 'chief or head of a family'. See *Online Etymology Dictionary*: https://www.etymonline.com/word/patriarch, https://www.etymonline.com/search?q=patriarchy&ref=searchbar_searchhint, (accessed 2 August 2019).
[21] *Lexico*: https://www.lexico.com/en/definition/patriarchy, (accessed 2 August 2019).

justification for what he identified as the equally natural authority of kings (as patriarchs) over their subjects. Filmer's interpretation of the naturalness of this hierarchy of authority, which excludes women from any independent authority, is rooted in his insistence that a hierarchy of authority started with Man, and that Woman was formed out of Man for Man. Women are therefore bound to obey men.[22]

The impact of this exposition of patriarchy on cultural, social and legal attitudes towards women has since then been examined by feminists as varied as Gerda Lerner,[23] Eva Figes[24] and Susan Brownmiller.[25] They argue that in extreme patriarchal societies men are socialised to link masculinity to power and entitlement.[26] To achieve and maintain dominance and control, physical and mental violence, including rape, are perceived as acceptable tools.[27] Brownmiller explains that '[i]t seems eminently sensible to hypothesize that man's violent capture and rape of the female led to the establishment of a rudimentary mate-protectorate and then sometime later to the full-blown male solidification of power, the patriarchy.'[28]

The relationship between patriarchy and the criminalisation of rape in international law is pivotal. The historical identification of rape in war as being an offence is because it constituted a violation of family or female honour epitomised, in masculine terms, the significance of women's purity[29] and chastity.[30] Though it is no longer described in such

[22] Robert Filmer, *Patriarcha*: *Or The Natural Power of Kings*, (London: Richard Chiswell, 1680). Children were also required to respond to paternal authority.
[23] Gerda Lerner, *The Creation of Patriarchy*, (New York, NY: Oxford University Press, 1986).
[24] See for example, Eva Figes, *Patriarchal Attitudes: Women in Society*, (Houndmills, Basingstoke and Hampshire: MacMillan Education Ltd., 1986).
[25] See Susan Brownmiller, *Against Our Will: Men, Women and Rape*, (London: Secker and Warburg, 1975).
[26] Hannah Wright, *Masculinities, conflict and peacebuilding: Perspectives on men through a gender lens*, (London: Saferworld, 2014), pp.i; 4.
[27] Ibid, pp.2; 6.
[28] Brownmiller, *Against Our Will*, p.17.
[29] *Online Etymology Dictionary*: http://www.etymonline.com/index.php?term=honor, (accessed 2 August 2019).
[30] Catherine N. Niarchos, 'Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', *Human Rights Quarterly*, (1995), 17(4), 649-90, p.674.

terms legally, this thesis examines how far the cultural influence of such patriarchal attitudes continues to affect the terms used to categorise rape in international law.

It is important to note, as part of this analysis, that to draw a connection in this way between patriarchal notions of masculinity and violence is not to make a claim that 'men are naturally violent.'[31] In the context of this thesis, an exploration of the relationship between patriarchal masculinity and violence acknowledges that in many cultures and communities 'violence is associated with men and boys in a way that it is not associated with women and girls.'[32] Breaking down such conceptualisations is vital if we are to ensure that the harms committed by and against either gender are recognised, or to enable inclusion of non-binary identification, are recognised in the language used to describe rape in international law.

(e) Hegemonic Masculinity

From the Greek *hēgemonia*, meaning 'leadership, a leading the way, a going first' and *hēgemon* 'leader, an authority, commander, sovereign',[33] the term 'hegemony' describes 'the social, cultural, ideological, or economic influence exerted by a dominant group'.[34] Since the nineteenth century, various experts have used the concept of hegemony to explore ideas of authority. Marxist theorist Antonio Gramsci, for example, notably employed the term to analyse forms of established political authority, evolving his theory of cultural hegemony in the context of emerging interwar fascism in Italy.[35] Since the 1950s, against the background of the decolonisation of European overseas empires,

[31] Wright, *Masculinities, conflict and peacebuilding*, p.5.
[32] Ibid.
[33] *Online Etymology Dictionary*: https://www.etymonline.com/word/hegemony, (accessed 2 August 2019).
[34] *Merriam-Webster*: https://www.merriam-webster.com/dictionary/hegemony, (accessed 2 August 2019).
[35] Antonio Gramsci, *Prison Notebooks: Volume I*, (edited and translated, Joseph A. Buttigengieg), (New York, NY: Columbia University Press, 1992); Antonio Gramsci, *Prison Notebooks: Volume II*, (edited and translated, Joseph A. Buttigieg), (New York, NY: Columbia University Press, 2011).

political and imperial historians have also used hegemony to explore the ways in which ruling classes or empires establish and maintain domination within states.[36] Social scientists, on the other hand, use the concept to analyse the construction of cultural hierarchies of authority within societies. Mike Donaldson comments that '[h]egemony involves persuasion of the greater part of the population, particularly through the media, and the organization of social institutions', in ways that seem or look ordinary, normal or natural.[37] Punishment for non-conformity to the established hegemonic norms is central to the enforcement and negotiation of the state's standards.[38] Legal systems are an important aspect of this process in that they are inherently an expression of a hegemonic authority. As Michel Foucault notes, punishment is more than a strict legal procedure. It is about cultural pressure where transgressors can be shamed for their actions, enhancing a will to conform to the dominant culture.[39]

The power of hegemony has since been used to explain the inherently gendered notions of masculinity and masculine authority and their impact on society and the law. Men's power over women and the idea that violence is a natural, normal expression of masculinity is central to a hegemonic analysis of the networks of power and authority within societies.[40] For example, social scientists argue that masculinity and violence are core to masculine-dominated institutions such as armies as part of the exercise of

[36] See for example, Richard Howson and Kylie Smith (eds), *Hegemony: Studies in Consensus and Coercion*, (Abingdon: Routledge, 2008).
[37] Mike Donaldson, 'What Is Hegemonic Masculinity?', *Theory and Society, Special Issue: Masculinities*, (1993), 22(5), 643-57, p.644. See also R. W. Connell, *Masculinities*, (Berkley and Los Angeles, CA: University of California Press, 1995).
[38] Donaldson, 'What Is Hegemonic Masculinity?', p.644.
[39] See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (New York, NY: Knopf Doubleday Publishing Group, 2012). See also Chloe Taylor, *The Culture of Confession from Augustine to Foucault. A Genealogy of the 'Confessing Animal'*, (Abingdon: Routledge, 2010), pp.129-30; Philip Smith, *Punishment and Culture*, (Chicago, IL and London: University of Chicago Press, 2008), pp.31-2.
[40] Rachel Jewkes, Robert Morrell, Jeff Hearn, Emma Lundqvist, David Blackbeard, Graham Lindegger, Michael Quayle, Yandisa Sikweyiya and Lucas Gottzé, 'Hegemonic masculinity: combining theory and practice in gender interventions', *Cult Health*, (2015), 17(2), 112-27, p.112.

patriarchal authority.[41] The relationship between hegemony and masculinity is particularly important when examining rape in international law. Historically men have been the key players in international law, drafting treaties and determining what constitutes an offence. As such, international law is the product of masculine values and agendas.[42] Within such value systems, women have been identified as lesser beings, and one consequence is that from a feminine perspective, they have not been adequately safeguarded from rape.[43] As touched upon by Judith Gardam 'the society or societies appear to have highly developed ideas of what is fair and what is not, as evidenced by the rules as to perfidious and treacherous means of warfare.'[44] As child bearers, she continues, '[t]his is the female norm worth protecting, to some extent, by the law of armed conflict.'[45] This point makes it plain that women have been framed as sexual objects for men, rather than players with a right to a voice and an assertion of authority. This framework is the product of hegemonic masculinity whereby women exist purely for the sexual needs of men.[46]

Experts have extensively examined the relationship between hegemonic masculinity and conflict-perpetrated rape.[47] Yet (with some exceptions such as Gardam) little attention has been paid to the relationship between hegemonic masculinity and the broader terms used to conceptualise rape in international law. Given that rape was originally constructed in hegemonic masculine terms as a property crime committed against the man who effectively owned the woman, this examination is critical to

[41] See for example, Wright, *Masculinities, conflict and peacebuilding: Perspectives on men through a gender lens*.
[42] Maria Eriksson, 'Defining Rape: Emerging Obligations for States under International Law?', Örebro University Studies in Law, (2010), pp.225-7.
[43] Ibid.
[44] Gardam, 'An alien's encounter with the law of armed conflict', p.237.
[45] Ibid, p.250.
[46] Donaldson, 'What Is Hegemonic Masculinity?', p.644.
[47] See for example Henri Myrttinen, 'Re-thinking hegemonic masculinities in conflict-affected contexts', *Critical Military Studies*, (2017), 3(2), 103-19; Gaby Zipfel, '"Let Us Have a Little Fun": The Relationship between Gender, Violence and Sexuality in Armed Conflict Situations', (translated, Karen Bennett), *RCCS Annual Review*, (2013), 5, 32-45; Wright, *Masculinities, conflict and peacebuilding: Perspectives on men through a gender lens*.

developing a lexicon of rape in international law, and understanding how these terms are currently used. Linked to this analysis is consideration of the concept of hypermasculinity.

(f) Hypermasculinity

Originally a psychological term used to describe two forms of unhealthy masculine identity – the so-called 'man's man' and the 'ladies' man' – the term 'hypermasculinity' or 'hypermasculine culture' has since been expanded by social scientists.[48] Hypermasculinity is identified as having a callous sexual attitude towards women, rooted in the idea that violence is manly and danger is exciting for males.[49] Varda Burstyn describes it as an 'exaggerated ideal of manhood linked mythically and practically to the role of the warrior',[50] 'the ideal man in the masculinist conception',[51] and 'the belief that ideal manhood lies in the exercise of force to dominate others.'[52] Hypermasculinity indicates an amplification of stereotypically masculine behaviours and traits, including physical strength, dominance heterosexuality, violence and sex drive.[53] It describes men's willingness to use violence, albeit sexual, against others to safeguard their families, communities, and nation.[54] This ability to control and dominate others is argued to have become a fundamental part of those social rituals, practices and norms that determine a person's – and nation's – 'manhood'.[55]

---

[48] Michael Kimmel and Amy Aronson (eds), *Men and Masculinities: A Social, Cultural, and Historical Encyclopaedia: Volume I: A-J*, (Santa Barbra, CA, Denver, CO and Oxford: ABC:CLIO, 2004), p.418; See also Leonard L. Glass, 'Man's Man/Ladies' Man: Motifs of Hypermasculinity', *Psychiatry: Interpersonal and Biological Processes*, (1984), 47(3), 260-78.
[49] Donald L. Mosher, and Silvan S. Tomkins, 'Scripting the Macho Man: Hypermasculine Socialization and Enculturation', *The Journal of Sex Research*, (1988), 25(1), 60-84, p.60.
[50] Varda Burstyn, *The Rites of Men: Manhood, Politics, and the Culture of Sport*, (Toronto: University of Toronto, 1999), p.4.
[51] Ibid, p.10.
[52] Ibid, p.192.
[53] Mosher and Tomkins, 'Scripting the Macho Man', p.80; *Collins Dictionary*: https://www.collinsdictionary.com/dictionary/english/hypermasculine, (accessed 2 August 2019).
[54] Wright, *Masculinities, conflict and peacebuilding*, in particular pp.6; 8; 18.
[55] Ibid, p.6.

Hypermasculinity is central to the critique of masculine military cultures. Feminists have long identified a link between 'militarism, an ideology which legitimises violent solutions to conflict and disorder, and patriarchy, an ideology which legitimises the domination of men over women.'[56] It has traditionally been held that militaries need a gendered ideology to enable them to function efficiently.[57] Historically armed forces have largely been composed of men. Expectations regarding their conduct have been powerfully gendered, normalising violent acts as part of a necessary strategy to enable them to defeat the enemy. Women are stereotypically labelled as being always potential 'victims' who should either be protected or sexually exploited, depending on the view taken by the dominant military authority.[58] The outcome is the normalisation of war and male-perpetrated violence in patriarchal societies.[59] Like hegemonic masculinity, hypermasculinity has affected how rape has been perceived and dealt with as a crime in international law. The question remains how far and in what ways has hypermasculinity, with its emphasis on an interpretation of society along gendered lines, influenced the terms used to categorise rape in international law.

(g) Gender

Central to the concepts discussed thus far is the issue of gender. Originally used to refer to the 'grammatical inflection of nouns',[60] the term 'gender' has long been used as a synonym for 'sex'.[61] In 1860, in *The Mill on the Floss*, for example, George Eliot (Mary Ann Evans) wrote, '[p]ublic opinion, in these cases, is always of the feminine gender—not the world,

[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] J. Richard Udry, 'The Nature of Gender', *Demography*, (1994), 31(4), 561-73, p.561.
[61] David Haig, 'The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945-2001', *Archives of Sexual Behavior*, (2004), 33(2), 87–96, p.87.

but the world's wife'.[62] From the fifteenth century, the *Oxford English Dictionary* quotes the use of gender for sex, though in the first edition of the 1899 Dictionary, this turn of phrase was 'described as jocular.'[63] J. Money's 1955 article on 'Hermaphroditism, gender and precocity in hyperadrenocorticism: Psychologic findings' marked an early attempt to reconceptualise the concept of gender within academic scholarship.[64] As part of his analysis of 'gender roles', Money suggests that the term 'sex' be used 'refer to the biological classification of male/female' and 'gender' be used to describe the 'differences in behaviour by sex'.[65]

Money's conclusion provided a revolutionary stepping-stone for second-wave feminist scholarship. Across different academic disciplines, such scholarship has regularly expanded on the idea that concepts of sex and gender should be treated differently. One cultural anthropologist, Gayle Rubin, coined the phrase 'sex/gender system' to describe 'a set of arrangements by which the biological raw material of human sex and procreation is shaped by human, social intervention'.[66] As part of her excavation of the oppression of women within society, Rubin describes gender as the 'socially imposed division of the sexes'.[67] While biological differences are fixed, she argues, gender differences are the result of social conventions or interventions, which dictate how men and women should act or behave.[68] Gender, in other words, is a social construct. It is, for Rubin, and for the majority of feminist scholars, something mutable that can be altered by changing demographics as well as social and political reform initiatives.

Use of gender as a broad headline term has become commonplace, and the sub-

[62] George Eliot (Mary Ann Evans), *The Mill on the Floss*, (Leipzig: Bernard Tauchnitz, 1860), p.305.
[63] Haig, 'The Inexorable Rise of Gender and the Decline of Sex', p.87.
[64] J. Money, 'Hermaphroditism, gender and precocity in hyperadrenocorticism: Psychologic findings', *Bulletin of the Johns Hopkins Hospital*, (1955), 96, 253-64.
[65] Udry, 'The Nature of Gender', p.561.
[66] Gayle Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex', in Pamela Nicholson, *The Second Wave: A Reader in Feminist Theory*, (New York, NY: Routledge, 1997), 27-62, p.32.
[67] Ibid, p.40.
[68] Ibid, p.54, (original emphasis).

sections which follow provide a discussion of key terms used to negotiate ideas surrounding gender identities and expectations of assigned gender roles, showing how these can differ both over time and between societies at any one chronological point. This ensures that developments in social thinking about the nature and operation of gender present an enduring challenge to an achievement of universal understanding, as current considerations of the non-binary in gender underlines. The descriptive or defining terminologies employed consistently invokes legacies of ambiguity.[69] When drawn on by theorists and practitioners, these descriptors and constructions are significantly influenced by an individual's age, ethnicity, culture, and sexuality.[70] The assumptions underlying the terms explored above are re-examined using explicitly gendered terminologies favoured by more recent gender scholarship when discussing rape in conflict. One reality noted for this thesis is that gender continues to be used as a simple synonym of sex, which, in part can be linked to gender essentialism.[71]

(h) Gender Essentialist Standards

'Essentialism' is a term used to summarise the philosophical idea that fundamentally objects have a nature based on qualities that are immutable and timeless.[72] When essentialism is applied to gender, the concept of gender essentialism reflects the idea that men and women are born with different natures, which are biologically determined rather than socially or culturally constructed.[73] From this perspective, men are portrayed as

[69] See for example Irma Specht, 'Gender, Disarmament, Demobilization and Reintegration and Violent Masculinities', in Instituto da Defesa Nacional, *Gender Violence in Armed Conflicts*, (Lisbon: Instituto da Defesa Nacional, 2013), 61-90, pp.61-3; Michelle Jarvis, 'Overview: The Challenge of Accountability for Conflict-related Sexual Violence Crimes', in Baron Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford: Oxford University Press, 2016), 1-17, pp.10-1.
[70] Jarvis, 'Overview', p.11.
[71] Haig, 'The Inexorable Rise of Gender and the Decline of Sex', p.87.
[72] Inger Skjelsbæk, 'Is Femininity Inherently Peaceful? The Construction of Femininity in War', in Inger Skjelsbæk and Dan Smith (eds), *Gender, Peace and Conflict*, (London: Sage, 2001), 47-67, p.49.
[73] Oxford Reference: https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095846595,

natural aggressors (relating to both hegemonic masculinity and its expression in a hypermasculine culture).[74] Women are stereotyped as nurturers, wives and mothers.[75] They are considered not only passive, submissive and fragile beings,[76] but also powerless, weak victims.[77] In international relations and international law, a convenient link is often made between gender essentialism and cultural essentialism.[78] The latter concept draws on thinking about both race and gender identity to assume that communities and societies possess deep-seated structural features.

These conceptualisations of essentialism have played a powerful role in not only the perpetration of gender-based violence (discussed below) against women in conflict-related environments, particularly the idea of women as 'spoils of war', but in its historic conceptualisation of rape as a violation of family rights. As discussed earlier, men too have been targets of rape in order to undermine their status.

Following the reconceptualisation of gender as a social, rather than biological construct in the mid-twentieth century,[79] international bodies such as the United Nations (UN, 1945-present) have officially largely abandoned traditional gender essentialism. However, this thesis questions the extent to which the legacy of gender essentialist thinking continues to have an influence on the terminology used to categorise rape in international law. This analysis is important because international actors like the UN

(accessed 3 August 2019). See also Karol Janicki, *Language Misconceived: Arguing for Applied Cognitive Linguistics* (Abingdon: Routledge, 2014), pp.83-5.

[74] Amani El Jack, *Gender and Armed Conflict: Overview Report*, (Brighton: BRIDGE, 2003), p.3.

[75] Ibid.

[76] Sarah Ben-David and Ofra Schneider, 'Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance', *Sex Roles*, (2005), 53(5/6), 385-99, p.388.

[77] Sharon E. Rogers, 'What men think about equality: Lessons from Oxfam GB staff in Delhi and Dhaka', in Sandy Ruxton (ed.), *Gender Equality and Men: Learning from Practice*, (Oxford, Oxfam: 2004), 171-93, p.181.

[78] Gina Heathcote, 'Participation, Gender and Security', in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security* (Basingstoke: Palgrave Macmillan, 2014), 48-69, pp.49-53; 64.

[79] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, (Abingdon: Routledge, 2011), pp.x-xi; 9-10; 45.

continue to be accused of perpetuating the idea that women are victims and men are perpetrators because of the language they employ in their legal documents. Such assumptions are more fully explored in the thesis chapters.

(i) Gender-Based Violence

Feminist scholars have used the term gender essentialism to identify how gender plays a critical role in the mistreatment of both men and women.[80] Michelle Jarvis makes the point that gender constructs 'form an inherent part of the fabric of any community group'.[81] Damaging that community often involves 'targeting the [traditional] gendered constructions on which the community rests'.[82] From this perspective, rape is typically used as a tool in conflict-affected environments to commit such injury. Women, for example, are stereotypically seen as the reproducers of the community. In ethnic conflict, rape is a tool used by a group to obtain and maintain social control and redefine ethnic boundaries by impregnating the women of another group.[83] Men too are often interpreted as targets of rape as part of a deliberate intent to harm a community group. For many communities, heterosexuality continues to be considered integral to masculinity and a requirement of manliness.[84] Homosexuality is regarded as a challenge to traditional masculinity in many cultures and is illegal or considered morally deviant in many states.[85] Rape is often used as a tactic during conflict to 'homosexualise' and demoralise the

[80] Jarvis, 'Overview', p.11.
[81] Ibid, p.12.
[82] Ibid.
[83] Laura Smith-Spark, 'How did rape become a weapon of war', *BBC News*, (publication date not available): http://news.bbc.co.uk/1/hi/4078677.stm, (accessed 14 April 2020).
[84] Miranda Alison, 'Wartime sexual violence and women's rights', *Review of International Studies*, (2007), 33(1), 75-90, p.77.
[85] Ibid. As of 2017, 72 states prohibit homosexuality, including Uganda, Kenya and other African states as well as Indonesia and Malaysia. Pamela Duncan, 'Gay relationships are still criminalised in 72 countries, report finds', *The Guardian*, 27 July 2017: https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report, (accessed 15 August 2019).

enemy.[86] These acts of directed harm are referred to as gender-based violence.

Though undefined in international law,[87] the UN does make use of the term. It describes 'gender-based violence' as 'any harmful act directed against individuals or groups of individuals' based on their gender.[88] These acts include rape, sexual violence, trafficking, domestic violence, forced marriage and destructive traditional practices.[89] For James Lang, gender-based violence is a form of 'violence rooted in prescribed behaviors, norms and attitudes based upon gender'.[90] Human Rights Watch calls it a form of 'violence directed at an individual, male or female, based on his or her specific gender role in society'.[91] It is used to destroy the political, religious and ethnic group with which victims identify.[92]

In theory, the concept of gender-based violence acts as a useful descriptor for rape in international law. A gender-neutral term, it can be used to describe targeted violence used by or against either gender as well as encompassing non-binary groups, while also appearing to acknowledge the associated harm of rape for the victim. Problems arise in its

[86] Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', p.1293-4. In over 70 states, same-sex relations can result in imprisonment. In Iran, northern Nigeria, Somalia, Sudan, Saudi Arabia and Yemen, homosexuality is punishable by state execution. In Syria and Iraq, non-state actors, such as the Islamic State, execute the death penalty. Although the death penalty can be handed down by the sharia courts in Afghanistan, Mauritania, Pakistan, Qatar and the UAE, there is no evidence to suggest that it has been implemented for private, consensual same-sex acts. Duncan, 'Gay relationships are still criminalised in 72 countries, report finds'. In Namibia, Jerry Ekandjo, Home Affairs Minister, urged police forces to 'eliminate' gays and lesbians 'from the face of Namibia.' Christopher Munnion, 'Namibian president orders gay purge', *The Telegraph*, 22 March 2001: https://www.telegraph.co.uk/news/worldnews/africaandindianocean/namibia/1327519/Namibian-president-orders-gay-purge.html, (accessed 15 August 2019).

[87] R. Charli Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations', *Security Dialogue*, (2006), 37(1), 83-103, pp.85-6.

[88] UN Human Rights Office of the High Commission, *Sexual and gender-based violence in the context of transitional justice*, October 2014.

[89] Ibid.

[90] James Lang, 'Introduction', in James Lang (ed.), *Partners in Change: Working with Men To End Gender-Based Violence*, (Santo Domingo: UN International Research and Training Institute for the Advancement of Women, 2002), 1-9, p.2.

[91] Human Rights Watch, *The War Within the War: Sexual Violence Against Women and Girls in the Congo*, (New York, NY: Human Rights Watch, 2002), fn 3; Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations', p.86.

[92] Inger Skjelsbæk, 'Sexual Violence and War: Mapping Out a Complex Relationship', *European Journal of International Relations*, (2001), 7(2), 211-37, p.215.

practical application. Instead of being generic, employment of gender-based violence as a term remains typically associated with violence perpetrated by men against women – a problem that the term 'sexual violence' also shares, which will be discussed in Chapter 5.

(j) Sexual Violence

The concept of sexual violence is another term which does not have a statutory definition in international law. The ICTR therefore provided its own definition, which was later adopted by the ICTY. It describes sexual violence, '*which includes rape*, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.'[93] The usefulness of describing rape as a form of sexual violence has been strongly contested. There debates will be discussed in Chapter 5.

(k) Conflict-Related Sexual Violence

Over time, common catchall labels used to categorise rape and among other crimes have been revisited by international organs such as the UN at the behest of state actors. Most notable is the emergence of the term 'conflict-related sexual violence'. The origins of this concept is located in the UN Security Council Resolution 1960 (2010).[94] Kirsten Campbell argues that the term 'conflict-related sexual violence' is broader than 'sexual violence in

[93] *Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, ICTR, 2 September 1998, para 688, (emphasis added); *Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić and Zoran Žigić (Trial Judgment)*, IT-98-30/1-T, ICTY, 2 November 2001, para 180. See also Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation', Office of the UN High Commissioner for Human Rights, (2012), 1-41: https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf, (accessed 27 August 2019), p.5; fn 5. In contrast, the ICC did not refer to any specific acts in its definition of sexual violence. Instead, it simply referenced acts of a sexual nature. See ICC, Elements of Crimes, 2011, Article 7 (1) (g)-6, Article 8 (2) (b) (xxii)-6, Article 8 (2) (e) (vi)-6.

[94] UN Security Council, Security Council Resolution 1960 (2010) [on women and peace and security], 16 December 2010, S/RES/1960

armed conflict', which reflects earlier international humanitarian legal frameworks.[95] For her, adding the qualifier 'conflict-related' widens the investigative landscape to include acts committed in (armed) conflict and post-conflict environments.

In theory, 'conflict-related sexual violence' is another valuable gender-neutral collective term for those examining all types of sexual violence committed in war or in environments where the residue of conflict remains. However, challenges have been made regarding the extent to which this term overlooks the role gender plays in the perpetration of conflict-related rape. Such debates will be examined in Chapter 8.

(l) Sexual Exploitation and Abuse

Sexual exploitation and abuse is a blanket term used by the UN, among other organisations, to describe rape (along with other crimes of a sexual nature) committed in conflict-related situations. In the absence of a statutory definition of these terms in international law, the UN has made several attempts to explain what constitutes these acts. As part of the UN's so-called 'zero-tolerance' policy on acts of sexual exploitation and abuse committed by its personnel,[96] the Secretary-General introduced a *Bulletin* entitled *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (2003).[97] The *Bulletin* describes 'sexual exploitation' as 'any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited

[95] Campbell, 'Producing Knowledge in the Field of Sexual Violence in Armed Conflict Research', p.470.
[96] The UN defines 'zero-tolerance' as 'establishing that sexual exploitation and abuse by United Nations personnel is prohibited and that every transgression will be acted upon'. See Task Team on the Sexual Exploitation and Abuse Glossary for the Special Coordinator on improving the UN response to Sexual Exploitation and Abuse, *UN Glossary on Sexual Exploitation and Abuse: Thematic Glossary of current terminology related to SEA in the context of the UN*, 24 July 2017, Second Edition: https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English_0.pdf, (accessed 24 August 2019), Section I, 1.1.2. See also Machiko Kanetake, 'The UN Zero Tolerance Policy's Whereabouts: On the Discordance between Politics and Law on the Internal-External Divide', *Amsterdam Law Forum*, (2012), 4(4), 51-61, p.51.
[97] UN Secretary-General, *Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, 9 October 2003, ST/SGB/2003/13.

to, profiting monetarily, socially or politically from the sexual exploitation of another.'[98] The term 'sexual abuse', on the other hand, refers to 'the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.'[99]

Attempting to provide further clarification, the UN later revisited these definitions in its *Glossary on sexual exploitation and abuse: Thematic Glossary of current terminology related to sexual exploitation and abuse (SEA) in the context of the United Nations* (2016, reissued 2017).[100] The *Glossary* initially defines sexual exploitation and abuse as a single concept: '[a] breach of the provisions of ST/SGB/2003/13 (Special measures for protection from sexual exploitation and sexual abuse), or the same definitions, as adopted for military, police and other United Nations personnel.'[101] The document then, confusingly, provides a separate definition for the term 'sexual exploitation', which states '[a]ny actual or attempted abuse of position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.'[102] The *Glossary* 'Comments' section clarifies that '"[s]exual exploitation" is a broad term, which includes a number of acts…, including "transactional sex", "solicitation of transactional sex" and "exploitative relationship"'.[103]

Though much has been written on the problems associated with the prohibition of transactional sex, this offence is not the focus of this thesis.[104] Instead, we turn to the

[98] Ibid, Section 1.
[99] Ibid.
[100] Task Team, *UN Glossary on Sexual Exploitation and Abuse*. The 2017 reissue has been referenced here as representing the most up-to-date version.
[101] Ibid, Section I, 1.1.7.
[102] Ibid, Section I, 1.1.6.
[103] Ibid, p.5.
[104] See Dianne Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies', in Vanessa E. Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements*, (Abingdon: Routledge-Cavendish, 2014), 259-82; Katayanagi, 'UN Peacekeeping and Human Rights', p.145. Muna Ndulo explains that such peacekeeping environments are characterised by broken economies, fragile 'judicial systems, corrupt and ineffective law enforcement agencies, weak or non-existent rule of law, and significant power differentials between peacekeepers and the local populations.' These key elements of

Glossary's definition of 'sexual abuse' – '[a]ctual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions'.[105] The 'Comment' section adds that '[a]ll sexual activity with a child is considered as sexual abuse. "Physical intrusion" is understood to mean "sexual activity". "Sexual abuse" is a broad term, which includes a number of acts described below, including "*rape*", "sexual assault", "sex with a minor", and "sexual activity with a minor".'[106]

This exhaustive definition not only buries rape alongside other crimes under the broader category of sexual abuse but risks conflating rape with other offences, notably sexual assault, for example, causing ambiguity. The *Glossary's* definition of rape is equally problematic. Described as the '[p]enetration – even if slightly – of any body part of a person who does not consent with a sexual organ and/or the invasion of the genital or

---

conflict-related realities expose civilians, and particularly women and girls, to risk of sexual exploitation. Ndulo, 'The United Nations Responses to the Sexual Abuse and Exploitation', p.130. As Maria Henry and Paul Higate rightly underline, when communities collapse, 'the power differentials configuring pre-conflict gender relations are reinforced', leading to the perpetuation of women's insecurity, placing them at greater risk of sexual abuse. Marsha Henry and Paul Higate, *Insecure Spaces: Peacekeeping, Power and Performance in Haiti, Kosovo and Liberia*, (London: Zed Books, 2013), p.142. The UN instead avoids recognising that conflict-affected settings often lead to women, as well as men, exchanging sex for food and shelter in order to survive (survival sex). Henri Myrttinen, 'From Pillars to Practice: Pushing the boundaries of "Women, Peace and Security"', unpublished paper, LSE Women Peace and Security conference, 29 December 2018. By prohibiting transactional sex without any explanatory qualification, the UN is able to overlook the gender profile intrinsic to poverty in such regions, and the wider realities and consequences associated with poverty-driven choices. This ongoing perspective serves to institutionalise not only gender inequality, but also feeds the poverty cycle in conflict environments. For a discussion regarding survival sex, see Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies', pp.261-7,278. The UN's universal embargo also denies individual sexual agency. Though survival sex often involves forced consent in the face of stark alternatives, the blanket ban rejects even the potential for choice on the part of the persons offering their services. Both male and female professional sex workers, for example, are known to migrate to peacekeeping missions to engage in transactional sex with troops. This framework is generally seen as cementing the low economic and social status of females in particular because it reinforces the idea of females as agentless victims, not as survivors. Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies', p.271; 273-74; Katayanagi, 'UN Peacekeeping and Human Rights', p.145. Even if we look beyond the problems associated with the UN's prohibition of transactional sex, it is clear that such acts are tolerated in the field. Jasmine-Kim Westendorf reports of UN mission leaders who advised peacekeepers to wear civilian attire and not leave UN vehicles in plain view when visiting brothels. A total of 800,000 condoms were sent to Cambodia to prevent the spread of sexual diseases. Westendorf, 'WPS, CRSV and Sexual Exploitation and Abuse in Peace Operations', p.2. These instances underscore the UN's unspoken tolerance towards the sexual exploitation of women by its peacekeeping personnel, which has implications for its lack of sensitivity to incidents where boundaries between transactional sex and rape are crossed by its own peacekeepers.

[105] Task Team, *UN Glossary on Sexual Exploitation and Abuse*, Section I, 1.1.4.

[106] Ibid, p.5, (emphasis added).

anal opening of a person who does not consent with any object or body part',[107] this delineation echoes definitional problems similar to those raised by the ICTY, the ICTR and the ICC (which will be addressed in Chapter 4).

A further complication is found in the *Glossary's* definition of '[s]ex with a minor', which states:

> Sexual penetration of a person younger than 18. Sexual penetration include(s) the penetration of the vagina, anus, or mouth by the penis or other body part, and also includes the penetration of the vagina or anus by an object. Sexual penetration of a child is prohibited regardless of the age of majority or consent locally and is considered as sexual abuse. Mistaken belief in the age of a child is not a defence.[108]

'Sexual activity with [a] minor', on the other hand, is defined as '[s]exual activity with a person younger than 18. All sexual activity with a child is prohibited regardless of the age of majority or consent locally and is considered as sexual abuse. Mistaken belief in the age of a child is not a defence.'[109] The normative conclusion is that sexual activity or sex with a minor, with or without consent, constitutes rape. It remains unclear why these acts are separated from the definition of rape or are not described as constituting rape. Introducing the issue of age of consent without further qualification also presents a number of problems, (which will also be addressed in Chapter 4). These definitional problems are indicative of a broader issue within the UN's institutional culture, which will be addressed in Chapter 8.

[107] Ibid, Section I, 1.2.8.
[108] Ibid, Section I, 1.2.10.
[109] Ibid, Section I, 1.2.11.

Conclusion

Though different scholars have used the concepts outlined above at different times to explain or contextualise different phenomenon or articulate different theories, it is clear that these concepts can each be usefully called on in this thesis to critique the lexicon of rape in modern international law. The next chapter explores the evolution of international law from ancient times to WWII (1939-1945), and the subsequent identification of rape as a war crime. In providing a starting point for the analysis of conflict-perpetrated rape, it will consider the impact patriarchy and an associated hegemonic masculine culture had on the framing of rape as a violation of family or female honour. This historical analysis is considered crucial to comprehending not only how rape was traditionally understood as a crime but also how far this framework continues to have an impact on modern-day prosecution choices.

Chapter 2

Historical Context: Evolution of Rape as a War Crime in International Law

Introduction

Following on from the previous chapter which identified the key concepts which have played an instrumental role in shaping understandings of rape in international law, attention now turns to the historical contexts out of which these concepts emerged. A key question for this thesis involves consideration of how far they have provided a legacy that continues to frame current understandings of the crime. Consequently, Chapter 2 provides an examination of the treatment of rape in armed conflict from ancient times to WWII (1939-1945). It looks at the emergence of international law, including the legal prohibition of rape, to identify how it was traditionally understood as a crime and how far this framework continues to have an impact on modern-day prosecutions. Central to this analysis is the examination of various legal instruments that played an intrinsic role in the development of international law, including those that established rape as a crime in this context. These include the General Headquarters of the Army, General order No.20 1847,[1] the Lieber Code 1863,[2] the *Declaration of Brussels 1874* (hereafter *Brussels Declaration*),[3] the *Oxford Manual 1880*,[4] and the *Hague Convention 1899 and 1907*.[5] Focusing on the

[1] Scott, Winfield. General Headquarters of the Army, General Order No. 20, February 19, 1847, *Tampico, Mexico*. Translated, Gauthereau-Bryson, Lorena. Tampico, Mexico: Imprenta de la calle de la Carniceria, 1847. From Woodson Research Center, Rice University, Americas collection, 1811-1920, MS 518: https://scholarship.rice.edu/jsp/xml/1911/27562/3/aa00208tr.tei.html, (accessed 5 September 2019).
[2] *Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863,* (Washington, DC: Government Printing Office, 1898), available at the University of Chicago: https://catalog.hathitrust.org/Record/100868332, (accessed 6 September 2019), (referred to hereafter as the Lieber Code).
[3] *Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874*, available in D. Schindler and J. Toman, *The Laws of Armed Conflicts*, (Leiden: Martinus Nijhoff Publishers, 1988), pp.22-34.
[4] *The Laws of War on Land. Oxford, 9 September 1880*, available in Schindler and Toman, *The Laws of Armed Conflicts*, pp.36-48, (hereafter the *Oxford Manual*).
[5] *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907*, International Committee of the Red

language used in each of these instruments to frame rape as a crime in international law, this chapter examines the effect of hegemonic masculinity. As part of this examination, the impact that hegemonic masculinity has had on the way rape was described as a crime in early international law as well as the role played by cultural and societal norms will be explored. Consideration will also be given to the challenges associated with the proliferation of such language in the modern era.

Rape in conflict is as old as war itself. Yet how it has been perceived between ancient and contemporary times has changed. Initially regarded as inevitable in war, by the eighteenth century, rape was prohibited in international law as a violation of family honour rather than as an offence against the individual (stereotypically female) victim. The perpetuation of this framework is damaging to rape victims. It constructs rape as a lesser property offence committed against the man who owned the woman, ignoring the harm caused to the victim. Other types of rape recognised formally as part of the modern landscape of international law, notably male-male and female-perpetrated rape, are also excluded. Analysing this historical background is important because it not only enables us to understand how rape in international law was traditionally framed as a crime but it helps contextualise modern prosecution practices in international law. Only when the past is understood can we understand the impact it continues to have.[6]

Emergence of Rules of War

Rooted in the moral codes of a particular society, basic principles of rules of war have existed since ancient times. Modern concepts of war crimes have emerged as valid out of these historical roots. The evidence for such rules suggests that they were unevenly applied

Cross: International Humanitarian Law Databases, (The Hague: International Conferences, 1907): https://ihl-databases.icrc.org/ihl/INTRO/195, (accessed 6 September 2019).

[6] Symeon C. Symeonides, *Choice of Law*, (Oxford: Oxford University Press, 2016), p.45.

and respected in practice, but, as Judith Gardam points out, their very existence testifies to a widespread consciousness of the need for them.[7] Indian religious texts, for example, outlined laws of warfare,[8] indicating that ancient Hindus distinguished between combatants and non-combatants.[9] Other Indian custom-based, spiritual texts stipulated also that religious places of worship and homes, which belonged to non-combatants or property that did not belong to the armed forces could not be destroyed or attacked.[10]

Though there are accounts of women in battle throughout history, the taking up of arms within an organised military force, in terms of cultural traditions, has been held to fall into the masculine province of capacity. As a result, examples of female combatants have entered the realms of mythology as extraordinary.[11] Homer's *The Iliad*, a comparable ancient text, claimed that 'war will be men's business'.[12] These rules of war were created

[7] Judith Gardam, 'An alien's encounter with the law of armed conflict', in Ngaire Naffine and Rosemary J. Owens, *Sexing the Subject of Law*, (London: Sweet and Maxwell, 1997), 233-50; Eve La Haye, *War Crimes in Internal Armed Conflicts*, (Cambridge and New York, NY: Cambridge University Press, 2008), pp.33-4; Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, (The Hague: Kluwer Law International, 1997), p.19. This diversity of context helps to explain why no clear codes emerged which could form a foundation for international law until towards the end of the nineteenth century, by which time the economic and political dominance of Western powers globally reduced the complexity of the challenge to the emergence of international law. See Jennifer Pitt, *Boundaries of the International: Law and Empire*, (Cambridge, MA: Harvard University Press, 2018).
[8] Some of these provisions are echoed in the Geneva Convention 1949 and Additional Protocol I, 'making ancient India a civilisation with the highest humane ideals of warfare.' La Haye, *War Crimes in Internal Armed Conflicts*, p.33.
[9] Ibid.
[10] Ibid.
[11] The Amazons, female mythical warriors, transgressed gender norms by cutting off their right breasts in order to perform archery more effectively. See Herbert Sussman, *Masculine Identities. The History and Meanings of Manliness*, (Santa Barbara, CA: Praeger, 2012), p.15. We know of other women combatants who both led and served in combat units. Egyptian queens Cleopatra Thea and Cleopatra VII led battles, as did Zenobia, queen of Palmyra who created a kingdom in the late 3rd century AD. The Iceni Royal Woman Boudica declared war on the Romans who occupied her land in c. AD60. The Brigantes Royal Woman, Cartimandua, also led her troops in battle. Celtic women of Ireland and the British Isles often fought alongside men, with descendants such as Grace O'Malley, the late sixteenth century Irish chieftain. Eve MacDonald, 'Warrior women: despite what gamers might believe, the ancient world was full of female fighters', *The Conversation*, 4 October 2018: https://theconversation.com/warrior-women-despite-what-gamers-might-believe-the-ancient-world-was-full-of-female-fighters-104343, (accessed 11 May 2020); Judith Cook, *Pirate Queen, the life of Grace O'Malley 1530–1603*, (Cork: Mercier Press, 2004). Muslim warrior Khawlah bint al-Azwar, who fought in battles during the life of the Islamic prophet Muhammad, is regarded as one of the greatest female military leaders throughout history. Farhana Qazi, 'The Mujahidaat: Tracing Early Female Warriors of Islam', in Laura Sjoberg and Caron E. Gentry (eds), *Women, Gender, and Terrorism*, (London and Athens: University of Georgia Press, 2011), 29-56, p.34.
[12] Homer, *The Iliad*, (translated, Rodney Merrill), (Michigan, MI: University of Michigan, 2010). It is accepted that the written text had previously existed in oral form.

to regulate and legitimise certain forms of male-male violence between enemy combatants in conflict.[13] Drawing on Plato's *Republic*, David Konstan points out that the purposes behind the establishment of these rules of war were intended to ensure that masculine violence was targeted only towards enemy combatants and not his own side.[14] He quotes from Menander's comedy, *The Shorn Girl*, to underline his point further; 'be careful not to do anything rash, given that you're a soldier', adding that 'men conditioned to violence are potentially dangerous'.[15] There is no mention of women's potential for violence, and as Aristophanes comedy *Lysistrata* underlines, women's weapons were identified as love (or more realistically, sex).[16]

Because of the emphasis placed in these codes on the quintessentially masculine dimensions to maintenance of individual honour and reputation,[17] at least some aspects of these rules were respected and enforced.[18] In religious texts such as the *Mahābhārata* and the *Rāmāyaṇa*, which depicted the Kurukshetra Wars, the rules of war operated powerfully.[19] Though there is little evidence that the Kurukshetra Wars actually took place, the survival of these tales indicates that the ethics of warfare and the concept of honour were important to Hindu culture.

[13] Frederic Megret, 'The Laws of War and the Structure of Masculine Power', *Melbourne Journal of International Law*, (2018), 19(1), 200-26, p.205.
[14] David Konstan, 'War and Reconciliation in Greek Literature', in Kurt A Raaflaub (ed.), *War and Peace in the Ancient World*, (Oxford: Blackwell, 2007), 191-205, pp.192-3.
[15] Ibid, p.193.
[16] Aristophanes, *Lysistrata*, (translated, Douglass Parker), (London: Penguin Signet Classics, 2009).
[17] The issue of personal honour will be returned to later in the chapter, however, it is noted here that as part of a broader discussion regarding homicide, Michael Kimmel and Amy Aronson briefly discuss the relationship between violence perpetrated by men and concepts of honour and reputation Michael Kimmel and Amy Aronson (eds), *Men and Masculinities: A Social, Cultural, and Historical Encyclopaedia: Volume I: A-J*, (Santa Barbra, CA, Denver, CO and Oxford: ABC: CLIO, 2004), p.388.
[18] Kaushik Roy, *Hinduism and the Ethics of Warfare in South Asia: From Antiquity to the Present*, (New York, NY: Cambridge University Press, 2012), p.30.
[19] Ibid, pp.29-30.

Under these rules, the sexual use of conquered women was regarded as normal and not identified as an offence.[20] Brutality against a defeated enemy and the acquisition of property were treated as a reward to the victorious troops and a deterrent to further action from the defeated side.[21] As the possession of male relatives, women were identified as property. Like other goods and chattels, they were considered 'legitimate booty' in war.[22] Even where sexual despoilment was disputed, it was in terms of whether war had been properly declared prior to invasion. Though evidence suggests that male rape was often used as a tactic in war,[23] its purpose was to emasculate, homosexualise or feminise the enemy,[24] and strip them of their ruler or warrior status.[25] By contrast, the sexual defilement of men was not considered a part of the 'spoils of war' paradigm. Instead male rape was understood as being an act of war rather than a reward of valour. Under a hegemonic masculine framework, women primarily exist as sexual objects for men.[26] The potential for men to be sexual objects for other men is negated.[27] Male rape was not – could not be – formally acknowledged as rape when perpetrated in the context of conflict.

[20] See for example, Tuba Inal, *Looting and Rape in Wartime: Law and Change in International Relations*, (Philadelphia, PA: University of Pennsylvania, 2013), p.4.
[21] Victoria Canning, 'Who's human? Developing sociological understandings of the rights of women raped in conflict', in Patricia Hynes, Michele Lamb, Damien Short and Matthew Waites (eds), *Sociology and Human Rights: New Engagements*, (Abingdon: Routledge, 2011), 39-54, p.42.
[22] 'Rape entered the law through the back door, as it were, as a property crime of man against man. Woman, of course, was viewed as the property.' Susan Brownmiller, *Against Our Will: Men, Women and Rape*, (London: Secker and Warburg, 1975), p.18; Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, p.21.
[23] See for example, Michael Carden, 'Homophobia and Rape in Sodom and Gibeah: A Response to Ken Stone',
Journal for the Study of the Old Testament, (1999), 24(82), 83-96, p.90.
[24] Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', *European Journal of International Law*, (2007), 18(2), 253-76, pp.254; 260; 270-3.
[25] Dennis O'Brien, *Understanding Male Sexual Abuse: Why Male Victims Remain Silent*, (Bloomington, IN: iUniverse, 2011), p.12.
[26] Mike Donaldson, 'What Is Hegemonic Masculinity?', *Theory and Society, Special Issue: Masculinities*, (1993), 22(5), 643-57, p.644.
[27] Ibid.

Throughout history, only women's bodies have played an important role as sexualised 'spoils of war'.[28] *The Iliad* details the sexual enslavement of women.[29] Plutarch's *Lives* depicts the rape of the Sabine women as a constructive aspect of the creation of Ancient Rome.[30] Kelly Dawn Askin references another Roman thinker, Cicero, reflecting that he advised that war should be fought humanely and urged armed forces to obey the laws of warfare.[31] According to Askin, he concluded that wars for glory or *property* are just but should be conducted with minimum hatred.[32] Cicero's principles were not often observed in practice. It is plain that the Roman military machine operated as a brutal weapon of destruction and that the rape of women as part of the crushing of an enemy formed part of the tactics used by Roman soldiers.[33] The gap between the rules and the reality of their enforcement is plain. But the fact that not only was there held to be a need for such rules but also that they are, as Gardam points out, both intricate and elaborate is of great significance to understanding the evolution of war crimes as a legal concept.[34]

These rules of war proved influential in the classically educated West. The combination of such ideas with Christian-inspired codes eventually resulted in a cultural conceptualisation whereby a consensus emerged that certain individuals and groups should be spared in war on moral or religious grounds, and that consensus became elaborated over time as warfare and its techniques also evolved.[35] Though the term 'civilian' had yet to be

[28] See for example, Gina Marie Weaver, *Ideologies of Forgetting: Rape in the Vietnam War*, (Albany, NY: State University of New York Press, 2010), p.1. It would be possible to add children's bodies to this, but boys were often slaughtered, and only young virgin girls were usually safe, thus the gender dimension is preserved.
[29] Homer, *The Iliad*; see Janie L. Leatherman, *Sexual Violence and Armed Conflict*, (Cambridge and Malden, MA: Polity Press, 2011), p.1974; Weaver, *Ideologies of Forgetting*, p.1.
[30] Weaver, *Ideologies of Forgetting*, p.1; Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, (Leiden: Martinus Nijhoff, 2012), p.xv.
[31] Askin, *War Crimes Against Women*, p.19.
[32] Ibid, pp.19-20.
[33] See for example, Sara Elise Phang, *The Marriage of Roman Soldiers (13 B.C.-A.D. 235): Law and Family in the Imperial Army*, (Leiden, Boston, MA and Köln: Brill, 2001), p.256.
[34] Gardam, 'An alien's encounter with the law of armed conflict', p.237
[35] Askin, *War Crimes Against Women*, pp.21-2.

fully defined or protected, Christendom[36] was on the verge of distinguishing between the innocent and the guilty in war by the end of the tenth century.[37] This evolution led to the emergence of the informal chivalric code for soldiers and knights during the eleventh and twelfth century in the West.[38]

From Chivalry to the Development of International Law

A hegemonic masculine concept rooted in social hierarchy,[39] the chivalric code was built on the idea that those men who possessed arms were honourable and those who did not were less so.[40] The willingness and ability of these men to fight cemented their high social status.[41] Steven and Naomi Shatz describe how chivalry was understood as an 'exclusive class-institution; it placed a gulf between the knightly order and the commonalty, and restricted its code of honour and courtesy peculiarly to members of its own caste; it generated a contempt for social inferiors and a disregard for their feelings'.[42] The focus was on preserving honour amongst combatants *not* the protection of non-combatants.[43]

The code of chivalry stipulated that rape of a woman deemed a 'lady' was unacceptable unless she had been won in combat:

[36] Christendom refers to those areas of Western Europe owning at least spiritual allegiance to the Papacy.
[37] Askin, *War Crimes Against Women*, p.22.
[38] La Haye, *War Crimes in Internal Armed Conflicts*, p.34. See for example, David Crouch, *The Birth of Nobility: Constructing Aristocracy in England and France, 900-1300*, (New York, NY: Pearson Education Limited, 2014), pp.80-6.
[39] See for example Cindy Wood, *Studying Late Medieval History: A Thematic Approach*, (Oxon and New York, NY: Routledge), p.156.
[40] Stephen Shatz and Naomi Shatz, 'Chivalry is Not Dead: Murder, Gender, and the Death Penalty', *Berkeley Journal of Gender, Law and Justice*, (2012), 27(1), 64-110, p.68; A. J. Pollard, *John Talbot and the War in France 1427-1453*, (Yorkshire: Pen and Sword Military, 2005), p.122.
[41] Jeffrey Richards *Swordsmen of the Screen: From Douglas Fairbanks to Michael York*, (Oxon and New York, NY: Routledge, 2014), pp.72-3.
[42] Shatz and Shatz, 'Chivalry is Not Dead', p.68.
[43] Brian J. Brill (ed.), *Law of War Workshop Deskbook*, (New York, NY: Williams Hein & Co, 2000), pp.184-5.

> [A]ny knight meeting a damsel who is alone should slit his own throat rather than fail to treat her honourably, if he cares about his reputation. For if he takes her by force, he will be shamed forever in all the courts of all lands. But if she is led by another, and if some knight desires her, is willing to take up his weapons and fight for her in battle, and conquers her, he can without shame or blame do with her as he will.[44]

Deriving from standards of male dominance, the harm caused by rape was identified as the dishonour brought on the lady's male protector.[45] The sexual defilement of men was not included in the code because rape was still understood as an offence committed by men against women only.[46] Thus, the concept of male-male rape was excluded from this chivalric provision.[47] Because the code of chivalry applied to only women of similar class to knights, the rape of women of a lower class was not considered dishonourable.[48] Nor was it considered dishonourable for a knight to rape his wife; he was permitted to use physical force and violence against his spouse if he could argue that her conduct warranted it.[49]

---

[44] Cited in Shatz and Shatz, 'Chivalry is Not Dead', p.69, (original source unknown). Use of the term 'damsel' here is significant, in that it was a term generally applied only to women possessed of some social status, otherwise descriptors like 'wench' or 'maid' would be preferred. See Jennifer Higginbotham, Girlhood of Shakespeare's Sisters, (Edinburgh: Edinburgh University Press, 2013), pp.37-9.

[45] See for example, Shatz and Shatz, 'Chivalry is Not Dead', pp.67-9. See also Shira Schwam-Baird, 'Terror and Laughter in the Images of the Wild Man: The Case of the 1489 Valentin et Orson*'*, in Edelgard E. DuBruck and Yael Even (eds), *Fifteenth-century Studies, Volume 27: A Special issue on Violence in Fifteenth-century Text and Image*, (Rochester, NY and Suffolk: Camden House and Boydell and Brewer, 2002), 238-56, p.243.

[46] For a discussion regarding male rape victims, see Amrita Kapur and Kelli Muddell, *When No One Calls it Rape: Addressing Sexual Violence Against Men and Boys*, (New York, NY: International Center for Justice, 2016): https://www.ictj.org/sites/default/files/ICTJ_Report_SexualViolenceMen_2016.pdf, (accessed 8 September 2019).

[47] Owing to their lack of power and lower ranking social position, women could not be knights. The issue of female-perpetrated rape was not considered relevant.

[48] Shatz and Shatz, 'Chivalry is Not Dead', p.69.

[49] Ibid, pp.77-8. Historically in English law the marriage contract was held to involve consent by the wife to give her husband access to her body at all times during the marriage. This was not unusual, and is of significance given the heavy influence of English law on the cultural attitudes underpinning international law. The implicit legal assumption that there could be no rape in marriage was first voiced in an opinion by Sir Matthew Hale in his *History of the Pleas of the Crown* in 1736. It was formally confirmed in *R v Clarence 1888*, which then held sway in the courts in England until 1992, when it was finally overturned.

The decline of feudalism and the rise of dynastic states, which depended on trade and commerce, saw the professionalisation of bearing of arms for all ranks. As the significance of the knightly class in warfare diminished, the chivalric code became obsolete.[50] By the late Middle Ages, use of mercenary armies equipped with cutting-edge weaponry increased. Conflicts that followed were frequently marked by widespread, limitless devastation. During this period, national military codes were increasingly used to punish non-elite soldiers for acts of undisciplined violence, including rape. Theodor Meron, for example, describes how soldiers who committed rape were 'subjected to capital punishment under national military codes such as those of Richard II (1385) and Henry V (1419).'[51] This development paved the way for the first international military court to be established in 1474, where Sir Peter von Hagenbach was tried for terrorising the town of Breisach without declaring war. He was prosecuted for war crimes, including rape committed under his commandment.[52] Sir Peter was found guilty of rape only because war had not been declared.[53] At the time, a due declaration of intent to attack was required. If he had declared war, Sir Peter's actions in despoiling the town of Brisach would have been considered acceptable.

By the end of the early modern period in the West expectations of what should happen to defeated populations, including the women had begun to change. Following the

It had already been challenged and substantially overturned in former colonies including Australia and New Zealand. *R v Clarence* (1888) 22 QBD 23, [1886-90] All ER Rep 133. See also Jocelyne Scutt, 'Consent in Rape: the Problem of the Marriage Contract', *Monash University Law Review*, (1977), 3(4), 255-88.

[50] Terry Gill, 'Chivalry: A Principle of the Law of Armed Conflict?', in Mariëlle Matthee, Brigit Toebes, and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face*, (The Hague: Asser Press, 2013), 33-52, p.36.

[51] Theodore Meron, 'Rape as a Crime Under International Humanitarian Law', *American Journal of International Law*, 87(3), (1993), 424-28, p.425.

[52] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR*, (Intersentia: Antwerpen and Oxford, 2005), p.4; Askin, *War Crimes Against Women*, p.29

[53] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.4; Askin, *War Crimes Against Women*, p.29.

destruction caused by the invasion of Italy by Charles VIII of France, the Thirty Years' War (1618-1648),[54] the American Revolutionary War (1775-1783) and the emergence of Enlightenment thought,[55] philosophers focused on the development of international law.[56] States, in turn, felt pressured to examine ways of limiting the damage caused by war, because of its commercial impact and re-evaluated the status of defeated populations as spoils of war. Addressing combatants' attitudes towards non-combatants was deemed crucial in ensuring conduct was appropriate in conflict.[57] This change in attitude resulted in Western governments introducing legally binding instruments, which aimed to protect vulnerable groups from the devastation of war.

In 1785, the Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America[58] was introduced. Despite its attempt to safeguard non-combatants, the legal language used to protect women in war is unclear and rooted in a traditional conceptualisation of rape,[59] declaring that women and children 'shall not be molested in their persons'.[60] However, the wording of the Treaty makes it plain that

[54] Thean Potgieter and Shadrack Ramokgadi, 'Casualties are a Given: Prepare for Them', in Thean Potgieter and Ian Liebenberg (eds), *Reflections on War: Preparedness and Consequences*, (Stellenbosch: Sun Media, 2012), 125-40, p.126.
[55] For a discussion of the Enlightenment, see Dena Goodman, 'Difference: An Enlightenment Concept', in Keith Michael Baker and Peter Hanns Reill (eds), *What's Left of Enlightenment?: A Postmodern Question*, (Stanford, CA: Stanford University Press, 2011), 129-47.
[56] For a discussion on Hugo Grotius, Francisco de Vitoria and Alberico Gentili, natural law and the development of international law, see Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, (Cambridge: Cambridge University Press, 2003); Peter Malanczuk, *Akehurst's Modern Introduction of International Law: Seventh Revised Edition*, (New York, NY: Routledge, 1997).
[57] See Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on* Luxury, (edited and with an Introduction by Béla Kapossy and Richard Whatmore), (Indianapolis, IN: Liberty Fund, 2008).
[58] *Treaty of Amity and Commerce, signed at the Hague (on behalf of Prussia) September 10, 1785, and previously (on behalf of the United States) at Passy (Franklin) July 9, 1785, at Paris (Jefferson) July 28, 1785, and at London (Adams) August 5, 1785. Original in French and English. Ratified by the United States May 17, 1786. Ratified by Prussia September 24, 1785. Ratifications exchanged at the Hague August 8, 1786. Proclaimed May 17, 1786*, The Avalon Project: Documents in Law History and Diplomacy, Yale University, New Haven, CT: https://avalon.law.yale.edu/18th_century/prus1785.asp, (accessed 5 September 2019).
[59] Askin, *War Crimes Against Women*, p.34; De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.5.
[60] *Treaty of Amity and Commerce,* Article 23.

rape was identified as a crime of interpersonal violence, perpetrated by men against women. Rape (by and against either gender) was not explicitly addressed or prohibited, nor did the Treaty state what the consequences of any breach would be. There is little evidence to suggest the instrument was used to prosecute rape.

Part of the problem is that victims often did not report being raped because of the stigma attached to the offence. Religious and cultural attitudes and beliefs relating to female chastity or purity mean that rape victims are still often seen as spoiled goods, resulting in their expulsion from their communities and families as well as wider society.[61] Another problem is that rape continued to be seen as acceptable in conflict. For example, during the War of 1812 (1812-1815) between the US, the UK and their respective allies, General Andrew Jackson allegedly coined the phrase 'booty and beauty' to make clear what sort of spoils go to the victor.[62] Captain Charles Napier, a British naval officer, later noted that 'every horror was committed with impunity – rape, murder, pillage. *And not a man was punished!*'[63] Such comments emphasising only the breach of military discipline not only underline the prevalence of rape in conflict, but its general acceptance as a natural by-product of war.

Addressing this issue, the US government during the Mexican-American war (1846-1848) created the General Headquarters of the Army, General order No.20. The Order gave the commander legal authorisation to prosecute American troops and Mexicans for crimes committed in the occupied areas, which were not listed in the Articles of War

[61] Kelly Dawn Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, (2003), 21(2), 288-349, p.298.
[62] Tamara L. Tompkins, 'Prosecuting Rape as a War Crime: Speaking the Unspeakable', *Notre Dame Law Review*, (1999), 70(4), 845-90, p.848.
[63] Stanley Quick with Chipp Reid, *Lion in the Bay: The British Invasion of the Chesapeake, 1813-14*, (Annapolis, MD: Naval Institute Press, 2015), p.76, (emphasis added).

(1776).[64] To ensure the Order was effectively implemented, military commissions were instructed to prosecute and sentence soldiers for their crimes.[65]

Under the Order, rape that was not instructed by a superior officer,[66] was prohibited and 'severely punishable'.[67] On the one hand, this article constitutes an advance. It clearly lists rape as an offence, which can be punished. On the other, the Order fails to prohibit *all* acts of rape. This instrument demonstrates that attitudes towards women as sexual objects had not substantially changed. Sexual access to women continued to be perceived as one of the consequences of war, helping to explain why, where rape perpetrated by soldiers was prosecuted, it was as a breach of military discipline or honour.[68]

Similar problems are found in the Lieber Code,[69] which created the foundation for the modern laws of land warfare.[70] Established during the American Civil War (1861-1865) by Francis Lieber, a German-born US political philosopher and jurist,[71] the Code provided a list of instructions for the Government of Armies of the United States in the Field on how combatants should conduct themselves in conflict, and what constituted acceptable and unacceptable conduct in war.[72] It stipulated that those found guilty of misconduct were to be held individually responsible for their actions.[73]

---

[64] Journals of the Continental Congress - Articles of War; September 20 1776, The Avalon Project: Documents in Law History and Diplomacy, Yale University: http://avalon.law.yale.edu/18th_century/contcong_09-20-76.asp, (accessed 2 August 2019); Yougindra Khushalani, *The Dignity and Honour of Women as Basic and Fundamental Human Rights*, (London, Hingham, MA and The Hague: Martinus Nijhoff Publishers, 1982), p.4.
[65] Thomas W. Spahr, *Occupying For Peace, The U.S. Army In Mexico, 1846-1848*, unpublished Dissertation presented in Partial Fulfilment of the Requirements for the Degree Doctor of Philosophy in the Graduate School of The Ohio State University, Ohio State University, (2011), p.206.
[66] General Order No. 20, Article 2, (emphasis added).
[67] Ibid, Article 3.
[68] For case examples, see Spahr, *Occupying For Peace, The U.S. Army In Mexico, 1846-1848*, p.207.
[69] Lieber Code.
[70] Inal, *Looting and Rape in Wartime*, p.29; De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.5; M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, (New York, NY: Cambridge University Press, 2011), p.427.
[71] Inal, *Looting and Rape in Wartime*, p.66.
[72] Lieber Code, Article 14.
[73] Ibid, Article 22: 'The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit.'

Under Article 44 of the Code, 'all rape' is prohibited as a form of 'wanton violence'.[74] Patricia Viseur Sellers states that the term 'wanton' refers to '[u]nnecessary violence committed against inoffensive citizens and soldiers alike'.[75] Thus, '*[a]ll rapes* were presumably characterized as wanton violence' and went 'beyond the bounds of military necessity.'[76] For Sellers, rape was clearly outlawed and punishable by death.[77] Evidence suggests that Article 44 of the Code was substantially enforced. Union military courts, for example, prosecuted approximately 450 cases involving rape and other sexual crimes committed against black and white women during the American Civil War.[78] In some instances, perpetrators were sentenced to death. On this basis, Sellers argues that the Code extended the reach of prohibitions of rape under humanitarian law to include conduct previously considered legal.[79]

While it is clear that Article 44 of the Code was enforced during the American Civil War, it is not necessarily because the act of rape itself was considered a serious offence. The term 'wanton' needs consideration here. Rooted in the Middle English word 'wantowen', meaning 'undisciplined',[80] by the start of the eighteenth century, 'wanton' was used in law to signify immoral or undisciplined conduct.[81] The term was used in the

---

[74] Ibid, Article 44.
[75] Patricia Viseur Sellers, 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law', in Olivia Q. MacDonald and Gabrielle Kirk Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience International and National Courts: Volume II, Part 1 Documents and Cases*, (The Hague: Kluwer Law International, 2000), 263-332, pp.271-2.
[76] Ibid, p.272, (original emphasis).
[77] See Lieber Code, Articles 44 and 47 sanctioned penalties for such conduct.
[78] Megan Kate Nelson, *Ruin Nation: Destruction and the American Civil War*, (Athens and London: University of Georgia Press, 2012), p.80; Crystal N. Feimster, 'What if I am a Woman?': Black Women's Campaigns for Sexual Injustice and Citizenship', in Gregory P. Downs and Kate Masur (eds), *The World the Civil War Made*, (Chapel Hill, NC: University of North Carolina Press, 2015), 249-68, p.258.
[79] Sellers, 'The Context of Sexual Violence', pp.272-3. Lieber Code, Article 80: 'the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information'.
[80] Dictionary.com: http://dictionary.reference.com/browse/wanton, (accessed 2 August 2019).
[81] Where a woman was described as wanton, the implication was primarily that she was an undisciplined or wayward individual. The association with female sexual immorality was part of it, but not necessarily the dominant one. In Sheridan's *School for Scandal*, Maria is accused of wanton behaviour because she spread a 'malicious truth', but not because of any sexual impropriety. Richard Sheridan, *School for Scandal*, (London: 1777).

Code to differentiate between unofficial, unauthorised acts of aggression and those sanctioned by issue of official orders.[82] For example, under General Order No.20, the General Headquarters of the Union Army clarified that only rapes that had not been ordered by a superior officer were prohibited under the Code, a clear indication that it was the indiscipline, not the act committed or any resultant harm that was being sanctioned. Even where rape was prosecuted following the American Civil War, it is not necessarily because of a change in attitude towards the rape of women, but because these incidents were considered unauthorised acts of violence or attacks against the American men who 'owned' those women.[83] This distinction is important in that determining official attitudes towards a tradition of women being perceived as acceptable 'spoils of war' in US military culture.[84]

The failure of the Lieber Code and military court judgments to unequivocally prohibit all rape meant that Western military cultures effectively endorsed avoiding making clear sanctions against conflict-perpetrated rape, preventing the emergence of a different focus.[85] In 1874, for example, the *Declaration of Brussels* (hereafter *Brussels Declaration*) was introduced, which attempted to codify the laws and customs of war internationally. Article XXXVIII stated '*honor and family rights* should be respected'.[86] The *Oxford Manual*, which was created to act as a model for internal legislation regarding the laws and customs of war,[87] established: '*[f]amily honour and rights,* the lives of

[82] Sellers, 'The Context of Sexual Violence', p.272.
[83] For a discussion on the Lieber Code, military discipline and rape, see Griffin Ferry, 'Oppression Through "Protection": A Survey of Femininity in Foundational Humanitarian Law Texts', *Law & Inequality: A Journal of Theory and Practice*, (2017), 35(1), 57-74, pp.62-3.
[84] See for example, Sidney Axinn, *A Moral Military*, (Revised edition), (Philadelphia, PA: Temple University Press, 2009).
[85] Nicole Hallett, 'The Evolution of Gender Crimes in International Law', in Samuel Totten (ed.), *Plight and Fate of Women During and Following Genocide*: *Volume 7*, (Piscataway, NJ: Transaction Publishers, 2012), 183-204, p.184.
[86] *Brussels Declaration*, Article XXXVIII, (emphasis added).
[87] *Oxford Manual*, pp.36-48; Bassiouni, *Crimes Against Humanity*, p.427.

individuals, as well as their religious convictions and practice, must be respected.'[88] The language used in these instruments suggests that the real damage of rape relates to the institution of the family (in itself seen as a key contributor to the stability of the state), which is traditionally understood as being male dominated. The harm committed against the (presumed female) victim is ignored.

These instruments were, in practice, rarely imposed as controls upon military behaviour. During the Boer War (1899-1902), only fourteen imperial and British troops were charged with rape or with aiding, abetting or attempted rape, nine of them being acquitted.[89] Stephen Miller suggests that such action was not rooted in military discipline but in the British government's interest to keep the official rape statistics down.[90] There may be some merit to this interpretation because the Boer War was widely criticised by other states, making it important for Britain to portray a heroic and valiant image of the British armed forces during the conflict. Acknowledging that rapes of Boer women had been committed by British troops would not have been considered conducive to this presentation,[91] whereas prosecuting soldiers for the murder of prisoners, for example, was considered necessary to preserve the Army's honour. Another possible explanation, however, is that the British army had their own imperatives relating to troop discipline. Local commanders, for example, were most concerned with the conduct of British troops involved in the removal of Boer women to concentration camps.[92]

[88] *The Laws of War on Land*, Article 49, (emphasis added).
[89] Stephen M. Miller, 'Duty or Crime? Defining Acceptable Behavior in the British Army in South Africa', *Journal of British Studies*, (2010), 49(2), 311-31, p.322.
[90] Ibid, p.323.
[91] For further information of Boer War rape cases that were dismissed, see ibid p.323-4.
[92] The issue of British troop management and conduct became a matter of public concern, thanks to W.T. Stead, the noted journalist, deliberately associating British soldiers with rape – if by proxy – and Arthur Conan Doyle robustly rebutting such charges. For further details, see Paula Krebs, *Gender, Race and the Writing of Empire. Public Discourse and the Boer War*, (Cambridge: Cambridge University Press, 1999), pp.80-3; 95-103.

Little evidence indicates that rape was addressed or dealt with in the Russo-Japanese war (1904-1905). Lieutenant-General C. J. Burnett, a British soldier, noted that during his time with the Imperial Japanese Army, he was not privy to any instance of ill-treatment committed by a Japanese soldier against either Russian prisoners or locals.[93] This statement does not mean that rapes did not occur. Rather, it implies that any acts were not perpetrated in direct view of foreign parties, and not reported or prosecuted. This point suggests that any incidents of rape were not perceived as such by figures like Burnett, probably because any instances involved local Chinese or Korean women, who might be regarded as legitimate spoils of war. Given the realities of WWII and the sexual enslavement of the so-called 'comfort women', one may argue that it is most likely that rapes occurred but went unmarked officially because they were not considered an offence by that army. [94]

Despite the continuity of cultural attitudes, the Boer and Russo-Japanese wars are important to mention because they had a transformative impact on attitudes towards warfare in the twentieth century. Advancements in weapons technology meant that the Russo-Japanese war had a devastating effect on civilian populations as well as combatants. Changes in traditional military strategies and a reliance on armed forces in pitched battles meant that the rate and extent of the brutality sustained by non-combatants in the Boer War was equally unprecedented.[95] The West determined that the rules of war needed more force if the scale and impact of warfare was to be contained within civilised limits. The *Hague Convention 1899 and 1907* was introduced which, alongside the *Geneva Convention*

[93] C. J. Burnett, 'Report by Lieut.-General C. J. Burnett, C. B., Head-Quarters Third Army, 14th July 1905', cited in General Staff (ed.), *The Russo-Japanese War: Medical and Sanitary Reports from Officers Attached to the Japanese Forces in the Field*, (London: The War Office, 1906), p.509.
[94] The comfort women will be discussed in further detail later in the chapter.
[95] The Carnegie Foundation reported: 'Nowhere in international law is there a clause relative to war on the ground and the treatment of injured which has not been violated by all belligerents, even by the Romanian Army, which, strictly speaking was not a belligerent.' See, Bruno Cabanes, *The Great War and the Origins of Humanitarianism, 1918-1924,* (New York, NY: Cambridge University Press, 2014), p.259.

1864,[96] aimed to codify the laws and customs of war on land captured in the Lieber Code.[97] Yet rape continued to evade clear prohibition. Article 46 of the *Hague Convention* stated that 'family honour and rights, the lives of persons… must be respected.'[98]

The language of 'respect' for 'family honour and rights' used in the *Brussels Declaration*, the *Oxford Manual* and the *Hague Convention* has received much comment from scholars, including feminists. Anne Marie de Brouwer, for example, writes that it is clear that rape was prohibited under these regulations. These instruments, she insists, signalled a shift in attitudes towards rape in conflict; it was beginning to be seen as a crime against the female rather than a prize for the victorious.[99] M. Cheriff Bassiouni suggests that the language of 'family honour and rights' was understood to be a euphemism for rape and was clearly prohibited.[100] Kim Stevenson notes that during this period, euphemistic language was often used by the courts to describe sexual behaviour.[101] However, given the language used in other articles within the *Hague Convention*, to suggest that euphemism was being employed does not provide an adequate explanation of the omission of any mention of rape from within the *Convention*. If the delegates genuinely wanted to address and prohibit rape in conflict, one would expect the use of the term 'prohibit' or the mention of women in the article.[102] Contextualising the omission in the *Convention*, there were extant discussions on rape within the jurisprudential and philosophical areas, as J. S. Mill's

[96] *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864. The Geneva Conventions was reviewed and extended in 1906 and 1929*, International Committee of the Red Cross, International Humanitarian Law Databases: https://ihl-databases.icrc.org/ihl/INTRO/120?OpenDocument, (accessed 6 September 2019).
[97] Bassiouni, *Crimes Against Humanity*, p.427.
[98] *Hague Convention*, Article 46.
[99] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.5.
[100] Bassiouni, *Crimes Against Humanity*, p.428.
[101] Kim Stevenson, 'Outrageous Violations: Enabling Students to Interpret Nineteenth Century Newspaper Reports of Sexual Assault and Rape', *Law, Crime and History*, (2014), 1(4), 36-61, p.45; Kim Stevenson, 'Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases', *Feminist Legal Studies*, (2000), 8(3), 343-66, p.351.
[102] Inal, *Looting and Rape in Wartime*, p.66.

work reveals. Equally Lieber explicitly prohibited rape in his Code.[103] It does, though, have to be admitted that generally during the eighteenth and nineteenth century, Europe experienced a rise in the concept of delicacy, the new prudery, which meant that public reference to sexuality such as that provided by Lieber was considered offensive.[104] The term 'rape' was considered to be a vulgar one, enunciating a primitive violent act, which civilised Western nations should neither engage in nor discuss.[105] Western women were considered too intellectually and emotionally delicate to cope with terminology that was considered to be blunt and brutal, and that this left a linguistic legacy in terms of the explanations used is plain from an examination of early twentieth century documents.[106] As this thesis notes, it means that the instruments developed in this period may have felt it less necessary explicitly to address and prohibit rape as previous, less delicate regulations such as the Lieber Code had done. This point is, though, particularly damning in modern eyes given that the *Brussels Declaration* and the *Hague Convention* relied heavily on the Code when developing the laws and customs of war.[107] There are broader factors that need to be considered. The language of diplomacy and inter-state treaties are typically born of compromise and negotiation. As a result, coy terms are often used alongside vague, aspirational language. The Leiber Code was not an inter-state instrument and could therefore afford to be more explicit and definitive, but this was not the case with either the *Brussels Declaration* or the *Hague Convention*.

[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] See John Ruskin, 'Of Queens Gardens', *Sesame and Lilies*, (London: George Allen, 1865). In this essay, written up from lectures delivered in Manchester in 1864, Ruskin emphasised civilisation depended on the invocation of female delicacy. This argument was combatted by John Stuart Mill, *On The Subjection of Women*, (London: Longman, Green Read and Dyer, 1869). Mill argues that it was male oppression that kept women 'delicate', through the pressure of custom etc. For critical comment on Ruskin, and other Victorian male authors sharing this view, see Kate Millet, *Sexual Politics*, (Urbana, IL: University of Illinois Press, 2000), p.90.
[107] The *Brussels Declaration* was 'taken from Lieber Code'. Similarly, the *Hague Convention* incorporated all of the 'prohibitions of the Lieber Code' except for rape; Inal, *Looting and Rape in Wartime*, p.61.

In developing the documentation laying down the modern rules of war, the issue with the continuing use of the concept of family honour and rights lies in its implicit endorsement of the identification of women, culturally at least, as male property, incapable of full agency and autonomy. Women continued to be held as core figures in the conceptual construction of the family and were primarily valued for their chastity as well as their roles mothers and as domestic caretakers.[108] As touched upon by Gardam, in the thinking underpinning these codes women are perceived only in terms of their bodies as a sexual objects for men and valued as a reproducers of a masculine heritage.[109] Over time, attitudes towards women have modified, yet one constant has been the expectation that they will fulfil a domestic, and so a passive, non-combatant role, which entitles them to masculine protection. Women's conduct in relation to their domestic profiles also continues to be used to estimate the moral and social status of a family in wider society. By employing the language of 'respect' for 'family honour and rights', the *Brussels Declaration*, the *Oxford Manual* and the *Hague Convention* effectively continue to frame women as male family property.[110] Such language reinforces ideas of the importance of 'male entitlement and female chastity'.[111] Rape is cast as a moral injury,[112] whereby 'the damage done to one's conscience or moral compass when that person perpetrates, witnesses, or fails to prevent acts that transgress' their own moral and ethical values or codes of conduct.[113] The moral fault thus rests with the victim, not the perpetrators because they were held to have made

[108] Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A critique of the 'Principle of Distinction*, (Oxon and New York, NY: Routledge, 2019), p.2013.
[109] Gardam, 'An alien's encounter with the law of armed conflict', p.250.
[110] Ibid.
[111] Rhonda Copelon, 'Rape and Gender Violence: From Impunity to Accountability in International Law', *Carnagie Council for Ethics in International Affairs*, 5 November 2003: http://www.carnegiecouncil.org/publications/archive/dialogue/2_10/articles/1052.html, (accessed 2 August 2019).
[112] Ibid.
[113] 'What is moral injury?', Syracuse University, Moral Injury Project, (publication date not available): http://moralinjuryproject.syr.edu/about-moral-injury/, (accessed 2 August 2019). See Appendix 4.

themselves vulnerable to their attackers.[114] Even where they are given protection, it is as privileged or specialist persons, because of their subordinate social status as women.[115]

The language of 'family honour and rights' does not capture the use of rape as a weapon or tool of warfare used to obtain or maintain power over an individual or group.[116] It fails to reflect the consequences associated with rape for the victim, including forced impregnation, contraction of sexual infections or diseases or other types of sexual or mental health injury. Nor does it address the issues of force or coercion or include the concept of consent. Employing 'honour' as a descriptor of conduct works to privilege masculine standards as the key marker of family honour. It signals continuation of a theme extant in historic records which evidence the origins of honour as a military concept in ancient history (notably Rome) and refreshed in the code of chivalry. This privileging of masculine values essentially serves to reject any idea of female autonomy. Actions taken by and against women have traditionally been measured solely against male standards. Male-male and female-perpetrated rape therefore cannot logically be included under this understanding of family honour.

In summary, the *Brussels Declaration*, the *Oxford Manual*, and the *Hague Convention* proved to be inadequate at effectively prohibiting rape because of the way in which they were shaped by gender essentialist thinking. As Margaret Davies points out, 'law is gendered'.[117] Laws, in both legal and cultural terms, she argues, are 'constructed around a masculine subject and an associated set of masculine characteristics, and that

[114] Copelon, 'Rape and Gender Violence'.
[115] See Chapter 8.
[116] For a discussion regarding rape as a weapon of war, see Kerry F. Crawford, *Wartime Sexual Violence: From Silence to Condemnation of a Weapon of War*, (Washington, DC: Georgetown University Press, 2017).
[117] Margaret Davies, 'Taking the Inside Out: Sex and Gender in the Legal Subject', in Ngaire Naffine and Rosemary J. Owens, *Sexing the Subject of Law*, (London: Sweet and Maxwell, 1997), 25-46, p.28.

these characteristics associated with masculinity are valued by law.'[118] Against this standard, the *Brussels Declaration,* the *Oxford Manual,* and the *Hague Convention,* fail to define or explain what the terms 'family honour', 'family rights,' or 'respect' mean in practical applications. An obligation for states to prevent rape by their soldiers is notably absent.[119] Even if we accept Askin, Stevenson and Sellers' observations that the language of 'family honour and rights' was understood as referring to rape, it remains unclear if states had a responsibility or duty to prevent such acts.[120] Use of the term 'respect' instead of the term 'prohibition' had led to rape being perceived as a low obligation in international law.[121] In the event that prosecutions for violation of the regulations occurred, the likeliness that rape would have been included in the charges was nearly non-existent.[122]

The exclusion of the term 'rape' from these instruments did not go unnoticed by contemporaries. Belgium's Hague delegate, Beernaert, stated that use of the language of 'family honour and rights' in the *Hague Convention* was unclear and too vague.[123] When Beernaert commented on the term 'honour', a debate ensued regarding the language used in Article 46 regarding 'appropriation of private property'.[124] No change was made to clarify the position on rape.[125] Instead, the Netherlands' delegate, General den Beer Poortugael, stated, 'it is neither necessary nor possible to define' in more 'detail the sense of this article [on rape], the purport of which is evident.'[126]

[118] Ibid.
[119] Inal, *Looting and Rape in Wartime,* p.61.
[120] Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law', p.300; Sellers, 'The Context of Sexual Violence', pp.271-2.
[121] See, for example, Meron, 'Rape as a Crime Under International Humanitarian Law', p.425.
[122] Inal, *Looting and Rape in Wartime,* p.61.
[123] Date of comment not provided. Ibid, p.63.
[124] Ibid.
[125] Ibid. It is worth remembering that during Belgium's occupation by Germany in the Great War, there were numerous incidents of rape of Belgian women and children. The Netherlands remained neutral.
[126] Ibid.

Echoing the earlier point regarding the language of diplomacy, Tuba Inal suggests that use of the terms 'honour' and 'family rights' in the *Convention* was a deliberate attempt to make general acceptance of the article easier since these terms are sufficiently flexible to allow for various interpretations.[127] As summarised by Beernaert, 'there are certain points which cannot be the subject of a convention and which it would be better to leave, as at present, under the governance of that tacit and common law which arises from the principles of the law of nations.'[128]

Inal has provided other explanations for the laws prohibiting rape to be vague.[129] She echoes earlier comments on the new prudery in diplomacy when she suggests that emphasis on finesse, decency, propriety and manners in nineteenth century Europe established a convention which meant that still, in the early twentieth century, the delegates thought it was not appropriate to make direct reference to the term 'rape' in a diplomatic legal document.[130] But the point she makes is that the delegates were undoubtedly aware of the importance of clarity in law and its language. Whilst they deliberately excluded measures that did not comply with extant legal practices, where they could not avoid making a legal judgment or statement, they sought to implement unclear provisions to make them less obligatory.[131] This point relates to Inal's use of the term 'normative shock' in relation to rape. The phrase refers to the everyday public reaction to conduct which is considered unacceptable, but at the same time normal for perpetrators – as is the case for most criminal behaviours. It is only when public attention is drawn to 'calamitous circumstances or events',[132] ones which are considered outside the normal scope of criminal events that 'the public conscience' is shocked into 'focusing on particular

[127] Ibid, p.65.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Inal, *Looting and Rape in Wartime*, p.146.

activities or institutions', in ways that change the norms of a society.[133] It was WWI (1914-1918), the first modern-age global conflict, which forced a change to the previous parameters of normative shock in reaction to the conduct of soldiers towards civilian populations. In the aftermath of that war, it made a reliance on the unclear provisions in the *Oxford Manual*, the *Brussels Declaration* and the *Hague Convention* unsatisfactory even in the eyes of many who had previously preferred the nuances to the obligations on states.[134]

World War I

The end of WWI led to the formal identification of war crimes as a matter for international law. Due to the scale and nature of that war, questions were raised regarding the treatment of non-combatants, including women.[135] As well as the issue of war reparations to be paid by states, the international community focused on individuals accused of what came to be labelled as war crimes. In 1919, the War Crimes Commission was created to investigate violations of the laws and customs of war committed by the Axis powers.[136] The Commission established that German soldiers had committed rape against Belgium and French women, among other crimes.[137] In 1921, the Leipzig War Crimes Trials were held to prosecute those responsible for committing war crimes before the *Reichsgericht*. Yet there was no criminal prosecution in international law; the trials were conducted under German criminal law.[138]

[133] Ibid, p.9. See also Meron, 'Rape as a Crime Under International Humanitarian Law', p.424.
[134] M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011).
[135] Gerhard Werle and Florian Jessberger (eds), *Principles of International Criminal Law, Third Edition*, (Oxford: Oxford University Press, 2014), p.4; Siniša Malešević, *Sociology of War and Violence*, (New York, NY: Cambridge University Press, 2010), p.137.
[136] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.5.
[137] Ibid, p.5.
[138] See Werle and Jessberger, *Principles of International Criminal Law*, p.4.

The Leipzig trials are generally considered a failure by the international community because of the few cases prosecuted as well as the court's perceived leniency towards offenders. Rape also continued to elude prosecution. Despite this omission, De Brouwer argues that the inclusion of rape as a violation of the laws and customs of war meant that the criminal nature of the offence was starting to be recognised.[139] However, recognition alone is easy and meaningless when enforcement is so easy to evade because of a fundamental lack of will to identify rape as a serious war crime. Turning to the WWII criminal tribunals, this chapter examines the extent to which the International Military Tribunal at Nuremberg (IMT, 1945-1946) and the International Military Tribunal for the Far East (IMTFE, 1946-1948) demonstrated a willingness to address the issue of conflict-perpetrated rape.

World War II

The legal approaches taken by IMT and IMTFE raise interesting points about the topicality of a public shift away from accepting certain types of conduct in conflict as simply normatively shocking.[140] Echoing this point, Meron remarks that '[i]t is a pity that calamitous circumstances are needed to shock the public conscience into focusing on important, but neglected, areas of law, process and institutions.'[141] The more horrifying the event, the greater the public pressure for swift change. The atrocities committed by the Nazis and the public's knowledge of them, he continues, led to the creation of the Nuremberg and Tokyo Tribunals; 'the evolution of the concepts of crimes against peace, crimes against humanity and the crime of genocide; the shaping of the fourth Geneva

[139] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.5.
[140] Inal, *Looting and Rape in Wartime*, p.9. See also Meron, 'Rape as a Crime Under International Humanitarian Law', p.424.
[141] Meron, 'Rape as a Crime Under International Humanitarian Law', p.424.

Convention; and the birth of the human rights movement.'[142] But this leads us to question where the prosecution of rape as a war crime fitted into that listing.

The IMT and IMTFE were the first international criminal tribunals of significant value to the history of prosecutions of rape as a war crime.[143] They were established by international treaty to enable the prosecution of those accused of being the major criminals from the European Axis powers and Japan for war crimes, crimes against peace, and crimes against humanity committed during WWII. Many other war criminals were tried separately before national military courts, which were led by the victorious nations under Control Council Law No. 10.[144] For the first time, individuals rather than states were held criminally responsible in international law.[145] The establishment of these bodies resulted in the international legal response to war crimes becoming more coherent and focused on the issue of wrongful behaviour towards non-combatants and prisoners of war. Both organs made some significant advances in prosecuting offences committed during armed conflict.[146]

The extent to which this development improved the regularity of rape prosecutions is debatable. To verify the systematic campaign of genocide and terror committed by the Nazis, rape was entered as supporting evidence at the IMT.[147] The Molotov Note[148] described acts of looting:

> which took place in every community, of general devastation, of *revolting acts*

[142] Ibid.
[143] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, pp.5-6.
[144] See Meron, 'Rape as a Crime Under International Humanitarian Law', p.426.
[145] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.6.
[146] Barbara Bedont and Katherine Hall Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court', *Brown Journal of World Affairs*, (1999), 6(1), 65-85, p.65.
[147] Nicola Henry, *War and Rape: Law, Memory and Justice*, (Abingdon: Routledge, 2011), p.30.
[148] Trial of the Major War Criminals before the International Military Tribunal at Nuremberg, 14 November 1945 – 1 October 1946, Vol. VII, official text in the English Language, (Proceedings 5 – 19 February 1946): https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-VII.pdf, (accessed 7 September 2019), p.440.

> *of rape*, ill-treatment, and mass murder – all committed against peaceful citizens by the fascist German occupational forces during their advance, during the occupation, and during their withdrawal.[149]

During the trial, the French prosecutor, Charles Dubost, briefly presented further evidence of rape. He described the rape of a 21 year-old woman by a German soldier in occupied France in 1944[150] as well as the rape of women and girls in St Donat, Crest, Die, and Saillans.[151]

Feminists like Nicola Henry have criticised Dubost for his indifference and off-the-cuff remarks when describing these offences.[152] His comments, she argues, signal that rape was not deemed important enough to warrant detailed discussion or analysis during the trial.[153] Dubost clarified with the President if he was required to read the entire document. For Henry, Dubost's actions made it appear like an arduous task to read out the documents.[154] It appears that rape was still regarded legally and culturally in a similar way to looting and pillaging; they were considered crimes, but not sufficiently heinous to warrant specific prosecution.[155]

Dubost's response illustrates the persistence of a hypermasculine culture in international war crimes prosecution proceedings. The IMT did not attempt to prosecute rape or even refer to the term 'rape' in its judgments.[156] Though not specifically referenced in its statute, rape could have been prosecuted as a form of ill-treatment under the war

[149] Ibid
[150] Trial of the Major War Criminals before the International Military Tribunal at Nuremberg, 14 November 1945 – 1 October 1946, Vol. VI, official text in the English Language, (Proceedings 22 January 1946 – 4 February 1946): https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-VI.pdf, (accessed 7 September 2019), p.404.
[151] Ibid.
[152] Henry, *War and Rape*, p.34.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Nicola Henry, 'Theorizing Wartime Rape: Deconstructing Gender, Sexuality, and Violence', *Gender & Society*, (2016), 30(1), 44-56, p.53; Henry, *War and Rape*, pp.35-6.

crimes and crimes against humanity categories as an inhumane act under the Lieber Code, the *Hague Convention*, or under Control Council Law No. 10, which lists rape (either implicitly or explicitly) as a crime against humanity.[157] This omission of rape prosecutions ensured that acts of male rape were also overlooked despite its prevalence. As Ray Douglas points out, 'I'm not aware of any major conflict including both world wars where you will not find examples of sex violence against men and boys in quite substantial numbers.' (See Appendix 4).[158]

Various theories have been proposed to explain why rape was not prosecuted at the IMT. De Brouwer, for example, claims that the Allied forces were concerned that they too might be prosecuted for rape and so were complicit in downgrading the seriousness of such incidents.[159] Miriam Gebhardt agrees, estimating that after the war, '860,000 women (and a good number of men) were raped.'[160] Of these, around 190,000 were attacked by American troops, others by Belgium, French or British soldiers.[161] Had both the Allied and the German forces been publicly held accountable for their actions, this would have undermined the moral high ground on which the victors were determined to stand.[162] On the other hand, following the end of WWII, Allied armies prosecuted some of their own troops for criminal misconduct during the conflict in their respective military courts. Though official courts martial details remain sealed, it is probable that these bodies did address instances of rape committed by Allied soldiers.[163]

---

[157] Henry, *War and Rape*, p.30; De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.6; Meron, 'Rape as a Crime Under International Humanitarian Law', p.426; 428.
[158] Alicia Jasmin, 'Historian uncovers reality of male rape during times of war', News, Tulane University, 12 October 2017: https://news.tulane.edu/news/historian-uncovers-reality-male-rape-during-times-war, (accessed 2 August 2019).
[159] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, pp.7-8.
[160] Miriam Gebhardt, *Crimes Unspoken: The Rape of German Women at the End of the Second World War*, (translated, Nick Somers), (Cambridge and Malden, MA: Polity Press, 2017), p.2.
[161] Ibid.
[162] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, pp.7-8.
[163] However, if they do exist, it is possible that the headline prosecution charge was not one of rape but rather of a breach of military discipline. See for example, Kate Grady, 'Disciplinary Offences at the Court Martial', *Criminal Law Review*, (2016), (10), 714-42.

Others are less convinced of the soundness of the reasons for not giving a higher ranking to rape prosecutions. Henry, for example, argues that it amounts to a failure of the Tribunal that it did not specifically prioritise prosecution of rape as a war crime and links this failure to status accorded to war crimes committed against women in international law.[164] She insists that the tradition of silence surrounding rape is 'connected to the politics of wartime rape and the gendered nature of legal discourse' given that law is a patriarchal institution.[165] Certainly, crimes committed largely against women continue to be seen and treated as lesser offences. Women's lack of formal involvement in the proceedings was also held to indicate a cultural and legal disinterest in prosecuting rape.[166]

The IMTFE is largely held as having been more effective in addressing rape.[167] During the proceedings, instances of rape were made public, including the Nanking massacre.[168] The court recognised that in 1937, between 20-80,000 Chinese women and girls were systematically raped in the occupied region.[169] The Tribunal established that these acts of rape were committed under the command of General Iwane Matsui, Commander-in-Chief of the Central China Area Army (CCAA) during the invasion of Nanking. The Tribunal determined that Matsui 'knew what was happening… [but] did nothing, or nothing effective to abate these horrors'.[170] He was sentenced to death for war crimes committed under his command.[171]

[164] Henry, *War and Rape*, p.29.
[165] Ibid.
[166] Ibid, p.8.
[167] Some Japanese revisionist theorists have disputed the claim that rape, let alone mass rape had occurred in Nanking. For further information, see Caroline Kennedy-Pipe and Penny Stanley, 'Rape in War: Lessons of the Balkan Conflicts in the 1990s', in Ken Booth (ed.), *The Kosovo Tragedy: The Human Rights Dimensions*, (London and Portland, OR: Frank Cass Publishers, 2001), 67-84, p.70.
[168] Henry, *War and Rape*, p.36.
[169] Iris Chang, *The Rape Of Nanking: The Forgotten Holocaust Of World War II*, (London: Penguin Books, 1998), p.6.
[170] International Military Tribunal for the Far East Judgment (IMTFE), Court House of the Tribunal War Ministry Building Tokyo, Japan, 4 November 1948: https://www.legal-tools.org/doc/8bef6f/pdf/, (accessed 7 September 2019), 49815-16.
[171] Ibid, para 49856.

The IMTFE found Kōki Hirota, Japanese foreign minister at the time the CCAA occupied Nanking, guilty on similar grounds. The Tribunal concluded that upon receiving information from the Nanking consulate of the atrocities being committed, he should have intervened more vigorously with the War Ministry to end the atrocities.[172] Failing to obtain an appropriate response from the Ministry, Hirota should have approached the Cabinet and taken immediate action to stop the massacre.[173] He too was sentenced to death.[174]

Rape was also prosecuted in the minor trials in the Far East. While Major-General Akira Mutō, Chief-of-Staff in the Philippines, was acquitted for his role in the rape of Nanking, he was charged and found guilty for his part in the outrages committed in the Philippines, including the Bantangas and Manila massacres.[175] The Tribunal found that during his tenure as Chief-of-Staff 'a campaign of massacre, *torture and other atrocities* was waged by the Japanese troops on the civilian population, and prisoners of war and civilian internees were starved, tortured and murdered.'[176] Presumably rape was included amongst 'torture and other atrocities' because such acts were committed during the Manila massacre. The Tribunal rejected Muto's defence that he did not know of the abuses committed[177] and sentenced him to death.[178] Likewise, in the minor trial of Tomoyuki Yamashita, the former Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, the US Military Commission concluded that the accused was criminally responsible for rape, amongst other offences, committed by troops under his command and sentenced him to death.[179]

[172] Ibid, para 49792-93.
[173] Ibid.
[174] Ibid, para 49793.
[175] Ibid, para 49738.
[176] Ibid, paras 49821-2, (emphasis added).
[177] Ibid, para 49822.
[178] Ibid, para 49856.
[179] *Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission, Vol. IV, published for the UN War Crimes Commission by His Majesty's Stationery Office, London, 1948*, (London: HMSO, 1948), pp.1-2.

The IMTFE's prosecution of rape under the *Hague Convention* and the Geneva Convention 1929 as a form of inhumane and ill-treatment and, once again, as a violation of family honour and rights has received much comment.[180] Brownmiller writes, for example, that if it was not for the Tribunal, the magnitude of the rape of Nanking would have been difficult to accept.[181] Though the major trials of this ad hoc Tribunal were conducted under international law, like the IMT, the minor trials were conducted under the rules of military law approved by a US Presidential Commission. This approach enabled the minor trials to be more creative in bringing prosecutions, particularly regarding rape prosecutions. The Tribunal established that during WWII, the Japanese government had institutionalised rape on a mass scale for the benefit of their soldiers, and was prepared to prosecute both high-ranking individuals and those further down the hierarchy. Askin comments that the inclusion of rape as a war crime in the proceedings was a positive feature of the Trials, meriting inclusion of rape in future prosecutions.[182] Henry remarks that the Tribunal's prosecution of rape marked a deviation from the silence surrounding rape and stands in stark contrast to the IMTs failure to prosecute perpetrators of rape.[183]

The IMTFE was not without fault. Like the IMT, rape was not clearly referred to in the Tokyo Statute.[184] As mentioned earlier, during the war, the Japanese Imperial Army created comfort stations in occupied territories where over 200,000 women were sexually enslaved.[185] Yet no reference was made to the state's involvement in the sexual enslavement of these women during the proceedings. To date, the Japanese government has offered only monetary compensation to survivors. The victims and activists deem this proposed submission inadequate because it holds neither a formal apology nor

[180] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.8.
[181] Brownmiller, *Against Our Will*, p.61-2; Henry, *War and Rape*, p.39.
[182] Askin, *War Crimes*, p.202; Henry, *War and Rape*, p.39.
[183] Henry, *War and Rape*, p.39.
[184] Ibid, p.36.
[185] De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, p.8.

acknowledgment of the existence of comfort stations.[186]

Even where rape was addressed by the IMTFE, victims of rape were not called to provide their testimony.[187] It is unclear from the records whether they were deemed incompetent witnesses, which is unlikely, or whether practical difficulties about getting them to the Tribunal location intervened. The most reasonable assumption is that victims were reluctant to come forward because of the ongoing stigma attached to such offences. Another likely factor is that the testimony of rape victims was seen as less important than testimony relating to the headline offences because rape continued to be seen as a lesser offence when measured against other crimes involving mass fatal atrocities.[188] Needless to say, the IMTFE failed to address instances of male rape.

Despite the number of rape prosecutions, the IMTFE proceedings cannot be held to signify a shift in international attitudes towards conflict-perpetrated rape. In the appeal to the Supreme Court by General Tomoyuki Yamashita in 1946 (*Yamashita v. Styer*) Justice Murphy stated, '[f]rom the earliest conflicts of recorded history to the global struggles of modern times inhumanities, *lust* and pillage *have been the inevitable by-products of man's resort to force and arms*.'[189] His remark cements not only the understanding that rape in war is linked to men's uncontrollable sexual urges and desires but once again raises the suggestion that hypermasculinity remains prevalent in conflict. It also suggests the continuation of the attitude that rape is unavoidable in conflict-related environments and cannot be discouraged because of the challenge this would provide to military morale.

[186] 'Japan's 2012 "comfort women" proposal included apology to victims by envoy, ex-officials say', *Japan Times*, 16 December 2019: https://www.japantimes.co.jp/news/2019/12/16/national/politics-diplomacy/japan-2012-comfort-women-apology/, (accessed 24 June 2020).
[187] Henry, *War and Rape*, p.39.
[188] Ibid, p.36.
[189] *Yamashita v. Styer (Judgment)*, Supreme Court, United States, 317 U.S. 1; 66 S. 340, 4 February 1946, (emphasis added).

Between 1948 and 1990, conflict-perpetrated rape continued to be committed largely with impunity.[190] In the Vietnam War (1955-1975), US soldiers systematically raped Vietnamese women.[191] During the Indo-Pakistani War (1971), Pakistani troops raped more than 200,000 Bengali women.[192] Khmer Rouge officials as well as the Royal Cambodian Armed Forces frequently perpetrated rape during the Cambodian genocide (1975 and 1979).[193] In the late 1990s, local women were raped by Indonesian military during the battle for independence in Timor.[194] Despite reports of these atrocities, rape continued to elude prosecution.[195]

Part of the problem is linked to rape's lack of 'normative shock' value. This point also relates to the earlier discussion regarding post-Enlightenment will in the West to avoid discussing rape openly as a matter of polite convention. To do so was considered vulgar and uncivilised. Here, Stevenson's point about the use of ambiguous language in the reportage of rape cases being deliberate becomes significant. Such ambiguity is justified by the need to avoid offending public morals and sensibilities and the traditional usage of this trope helps to explain the lack of public outrage over the failure to prioritise rape prosecutions.[196] It enabled a presumption that such matters were being dealt with, but discreetly in the interests of that public morality and of the victims themselves. Rape still did not enter overtly into public knowledge of the details in prosecution cases in the courts

[190] This caveat is included should there be a retrospective decision, as with Northern Ireland, to investigate and possibly prosecute for war crimes.
[191] See Weaver, Ideologies of Forgetting, p.19.
[192] Tompkins, 'Prosecuting Rape as a War Crime', pp.848-9.
[193] For a discussion on the Khmer Rouge and abuses, see for example, Human Rights Watch, *Cambodia's Dirty Dozen A Long History of Rights Abuses by Hun Sen's Generals*, (New York, NY: Human Rights Watch, 2018).
[194] Martin Kich, 'East Timor, Abuse of Women during War', in Bernard A. Cook (eds), *Women and War: A Historical Encyclopaedia from Antiquity to the Present, Volume One*, (Santa Barbara, CA: ABC-CLIO, 2006), 160-1, p.160.
[195] Stevie Greenleaf, 'A war within a war', *The Guardian*, 10 June 2013: https://www.theguardian.com/global-development-professionals-network/2013/jun/07/war-within-war, (accessed 2 August 2019).
[196] Kim Stevenson, 'Unearthing the Realities of Rape: Utilising Victorian Newspaper Reportage to Fill In the Contextual Gap', *Liverpool Law Review*, (2007), 28(3), 405-23.

in the period up to and including the post-WWII trials.[197] Though the international community was aware of the perpetration of rape during WWI and WWII, it was not reflected in news coverage or in reportage of war crimes proceedings because of this habit of discretion. During this period, there was no shift in expectations regarding the need to prosecute rape as a war crime.[198]

It was not until the Yugoslavian and Rwandan conflicts that the international community demanded a change. Following extensive media coverage of the mass atrocities committed during these wars, the UN Security Council (UNSC**,** 1945-present) founded specialist courts in the shape of the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017) and the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) to prosecute those deemed responsible for the perpetration of war crimes. Resulting pressure from activists and international/non-governmental organisations (I/NGO) led not only to rape being added to the prosecution agendas of each of these Tribunals but its reconceptualisation as an offence in international law. Both the ICTY and the ICTR created their own individual gender-neutral definitions of rape (Appendix 1). The establishment of these Tribunals left a powerful legacy, paving the way for the establishment of other international criminal organs, including the permanent the International Criminal Court (ICC, 2002-present), which also constructed a separate gender-neutral definition of rape for its prosecution purposes. The context in which these bodies and their definitions of rape were created will be explored in the next chapter.[199]

[197] George V, for example, was outraged when there were attempts by British propagandists to portray Germans as mass rapists during WWI. While such claims were implicit in the subsequent propaganda, especially retrospectively, it did not urge this on public understandings of the German soldiery.
[198] During the war of independence in Bangladesh, for example, it is estimated that 200,000 Muslim women were raped. For further information, see Kennedy-Pipe *et al.*, 'Rape in War', p.71.
[199] Meron, 'Rape as a Crime Under International Humanitarian Law', p.424.

Conclusion

Initially considered acceptable conduct as part of the rules of war, rape was later prohibited as a violation of family or female honour in international law. This characterisation is damaging. It not only perpetuates the hegemonic masculine idea that women are the property of men who either formally or effectively possess them, but it frames rape as an attack against women's families and the wider community's status, not on the victim. As a result, rape victims are often stigmatised and exiled from society because they become a symbol of the loss of community and family honour or status. The language of family or female honour does not convey the use of rape as a weapon in war or as a tool to obtain and exercise power over the individual and their community. Nor does it reflect the consequences of and harm caused by rape. Rather, describing rape as a violation of family or female honour reinforces the traditional understanding of rape being a heteronormative crime. Consequently, acts of male-male and female-perpetrated rape are excluded from this framework.

Even if we look beyond the symbolic significance of such terminology and accept the premise that the introduction of such laws indicates a change in attitudes towards rape in war, there are critical issues relating to their implementation. As this chapter has shown, even in the conflicts of the first half of the twentieth century, rape was rarely prosecuted or addressed as a war crime. Yet the potential for doing so existed under the Lieber Code, the *Brussels Declaration*, the *Oxford Manual*, and the *Hague Convention*. Though the IMTFE, for example, acknowledged the prevalence of rape in WWII, the Tribunal omitted to prosecute offenders explicitly for committing rape as a war crime. Without a will for enforcement, these instruments have proved of little practical value.

Responding to the historic failure of the international community to address rape

in international law as a serious crime in its own right, figures such as Askin, Meron, and Henry have written extensively on how rape should be addressed as a crime in modern international law. Such scholarship has had a significant impact on modern-day attitudes towards conflict-perpetrated rape, culminating in the international community's response to the Yugoslav and Rwandan conflicts. The worldwide media reportage on systematic rape of civilians during these wars made the issue topical, substantially accounting for the successful pressure brought on the UN by I/NGO and activists to prosecute perpetrators. This development was transformative, leading not only to the establishment of the ICTY and the ICTR, and later the ICC, but also to these specialist international courts creating their own definitions of rape as a war crime.

Before analysing the prosecution of rape by these organs as well as their definitions of the crime, it is important to examine first the evolution of modern international law from 1945 in order to comprehend and situate such advancements. Developments over time in international law are rarely the by-product of a single event or isolated incident. They typically result from a combination of factors working to highlight fresh areas of public reaction, including changes in social attitudes towards what is considered (un)acceptable conduct and shifts in public expectations regarding how the international community should respond to such activity. Attention now turns to the broader developments and events that led to the founding of specialist courts to deal with international criminal prosecutions in the shape of the ICTY, the ICTR and the ICC. Their individual structure and the background that guided their individual decisions to create their own different definitions of rape will also be analysed, as will their impact on subsequent war crimes prosecutions, including the launch of the Extraordinary Chambers in the Courts of Cambodia (ECCC, 1997-present) and the Special Court for Sierra Leone (SCSL, 2002-2013). This investigation will contextualise not only the establishment of the ICTY, the

ICTR and the ICC, and their legacy but their decision to define and prosecute rape in international law as well as the key factors that influenced their approach, including their decision to categorise rape as an offence under headings such as sexual violence, an outrage upon human dignity and torture.

Chapter 3

Modern International Criminal Tribunals

Introduction

The previous chapter examined the development of international law from ancient times until WWII and the way in which rape emerged as a war crime. Chapter 3 takes that historical analysis into the twenty-first century by exploring the developments from the setting up of the United Nations (UN) in 1945 up to mid-2019. This examination will contextualise the discussion in the succeeding chapters regarding the categorisation of conflict-perpetrated rape in modern international law.

At the end of WWII, after the failure of the League of Nations (1920-1946) to maintain global peace, members of the Allied forces, principally the UK and the US, founded the UN as an institution with a global membership and remit. That body emerged out of the wartime War Crimes Commission (1943-1948) based in London. Shaped by the Commission, the UN's initial agenda was largely in keeping with Allied expectations of how best to maintain international peace and security. As part of its founding commitment, the UN created the Security Council (UNSC) in 1945.[1] Paralysed during most of the Cold War era (1947-1991),[2] the UNSC's powers rapidly expanded in the 1990s, leading to the launch of numerous peacekeeping and military operations as well as the establishment of international sanctions and courts. The UNSC played a significant part in developing the concept of specialist international criminal tribunals as a peacebuilding tool in conflict-afflicted regions in the post-Cold War era.[3]

[1] Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, (Cambridge: Cambridge University Press, 2017), p.32.
[2] The exception to this was the Korean War (1950-1953), where the UN resolved to provide military force to repel North Korea's invasion of South Korea.
[3] The UN also acted as the sponsoring body to the development of a system of international courts, with

Though the establishment of modern international criminal tribunals and courts will be examined more broadly, particular attention will be paid to the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017), the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) and the International Criminal Court (ICC, 2002-present). These were the first bodies to address both the conceptualisation and categorisation of rape as a war crime in international law. While other tribunals have since been established, for example, the Extraordinary Chambers in the Courts of Cambodia (ECCC, 1997-present) and the Special Court for Sierra Leone (SCSL, 2002-2013), their contributions both relate to and build on the work of the ICTY, the ICTR and the ICC. In this context, these specialist international hybrid courts are not subjected to the detailed critical examination accorded to the ICTY, ICTR and ICC because, for this thesis, their significance relates to the impact and legacy of these tribunals and the ICC.

Returning to the themes that will be discussed in this chapter, consideration will be given the role played by the judiciary, to provide context for the later discussion of their involvement in evolving the definitions of rape invoked by the ICTY, the ICTR and the ICC. This analysis will include a consideration of the gender and nationality of individual judges. Such framing is key to understanding the factors that contributed to the reconceptualisation and categorisation of rape in modern international law.

---

the intention that the post-war ad hoc tribunals established to try war criminals from WWII. See for example, Philippe Kirsch, John T. Holmes, and Mora Johnson, 'International Tribunals and Courts', in David Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, (Colorado, CO: Lynne Rienner Publisher, 2004), 281-94.

The International Court of Justice

Established by the UN Charter in 1945, the International Court of Justice (ICJ) is the first and main permanent judicial body of the UN. The founders of the UN initially saw the ICJ as the essential arbitration organ for securing global peace.[4] Sitting in The Hague, the jurisdiction of the Court is limited by its mandate, which is rooted in a traditional understanding of the remit of international law. Sir Francis Jacobs QC recollects that when taking his 'first steps in international law', the original mantra was that '"only states were the subject of international law" – and perhaps later, progressively, international organisations'.[5]

The role of the ICJ is to settle only legal disputes or challenges submitted by Member States in line with international law as they relate to states as well as to give advisory opinions on legal queries raised by authorised UN organs and specialised bodies.[6] Only Member States can appear before the ICJ in contentious cases, which relate to inter or intra-state obligations in international law.[7] The ICJ does not have the jurisdiction to address applications from corporations, non-governmental organisations (NGO) or individuals, unless they are specially designated UN organs or agencies. Even if a Member State were to take up the case of one of its nationals in order to petition against a wrongful act, which its national claims to have endured at the behest of another Member State, the dispute would be between those Member States, not the national.[8]

[4] For a discussion on the ICJ, see Robert Kolb, *The International Court of Justice*, (Oxford and Portland, OR: 2013).
[5] Sir Francis Jacobs, 'Foreword', in Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law*, (Cheltenham: Edward Elgar, 2017), ix-xi, p.ix.
[6] Shabtai Rosenne, 'International Court of Justice (ICJ)', Oxford Public International Law: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e34, (accessed 7 September 2019)
[7] UN, Statute of the International Court of Justice, 18 April 1946.
[8] Ibid, Article 34(1).

The Court, in theory, has the capacity to address acts of sexual and gender-based violence, including rape, which involve a Member State's failure to live up to the obligations of the treaties and conventions to which they are signatories.[9] The ICJ Statute states that '[t]he Court shall have the power to indicate provisional measures which ought to be taken.'[10] This provision protects states pending a decision on their case. Moreover, the Court may order states to end practices, which disproportionately affect women.[11] On this basis, the ICJ's judgments may influence state obligations in international law in relation to rape, with an emphasis on the obligations of named states.[12] In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia (Serbia and Montenegro))* (Provisional Measures) Order of 13 September 1993, for example, the Court held:

> Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately… from the murder, summary execution, rape**,** kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina.[13]

Later in *Application of the Convention on the Prevention and Punishment of the Crime of*

[9] 'International Court of Justice', LSE Centre for Women, Peace and Security, (publication date not available): https://blogs.lse.ac.uk/vaw/int/charter-bodies/icj/, (accessed 2 August 2019), (see Appendix 4).
[10] UN, Statute of the International Court of Justice, Article 41.1.
[11] 'International Court of Justice', LSE Centre.
[12] Ibid.
[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)); Order of the Court on Provisional Measures*, International Court of Justice (ICJ), 13 September 1993, (q). Present: President Sir Robert Jennings; Vice-President Shigeru Oda; Judges Stephen Schwebel, Mohammed Bedjaoui, Ni Zhengyu , Jens Evensen, Gilbert Guillaume, Mohamed Shahabuddeen, Andrés Aguilar Mawdsley, Christopher Weeramantry, Bola Ajibola, Géza Herczegh; Judge ad hoc Hersch Lauterpacht; Judge Nikolaj Konstantinovitsj Tarassov; Milenko Kreca.

Genocide (Croatia v. Serbia) (2008),[14] the ICJ considered whether rape and other acts of sexual violence constitute genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (1948).[15] Under the Convention, genocide is the deliberate attempt to exterminate an ethnic or religious group by state actors. Genocide is a breach of a national obligation in international law for which a state takes responsibility and it is therefore a state matter, bringing it under the remit of ICJ. Though it falls within the jurisdiction of the Court, it lacks any enforcement mechanism to back up any of the judgments made under this heading.

The ICJ does not have the authority to prosecute individual perpetrators of war crimes or crimes against humanity or to define such offences.[16] The nascent UN determined instead that a specially constituted permanent ICC would deal with these crimes separately (to be discussed later in the chapter). By the time the UN was formally established in 1945, attempts to develop such a body were put on hold in the light of the urgent need to address the German and Japanese war crimes. As a result, the International Military Tribunal at Nuremberg (1945-1946) and the International Military Tribunal for the Far East (IMTFE, 1946-1947) were set up to deal with the immediate emergency. Their focus was the prosecution of alleged perpetrators of war crimes during WWII only; they were never intended as a permanency. The UN envisioned that once the IMT and IMTFE proceedings had concluded, an ICC would be developed for future international use. It was planned that the ICC would operate alongside the ICJ, but it was not anticipated that

[14] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, General List No. 118, ICJ, 18 November 2008. Present: President Higgins; Vice-President Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judges* Ad Hoc Vukas, Krecua; *Registrar* Couvreur.

[15] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, UN, Treaty Series, vol. 78, p.277. Genocide is not a modern phenomenon. Rather, it is something very old in practice. Historians of ancient Rome, for example, regularly use the term genocide to describe Trajan's Dacian wars. See for example Simon Baker, *Ancient Rome: Rise and Fall of an Empire*, (New York, NY: Random House, 2007), p.292.

[16] UN, Statute of the International Court of Justice, Article 36(2)(a-d).

individual prosecutions from future major conflicts would be within its main remit. The ICJ was expected to prevent such wars from developing. This parallel project did not materialise. In the wake of the main conclusions of the IMT and IMTFE, discussions regarding the development of an ICC resumed behind the scenes from 1948 until 1954, but were shelved when the Cold War started to escalate.[17]

During the Cold War and its immediate aftermath, intra and interstate conflicts continued to breakout across the globe, most notably in the former Yugoslavia and Rwanda in the 1990s. In the absence of a permanent ICC, the UN was forced by international public pressure to revert to the post-WWII precedent and create two new specialist ad hoc tribunals to deal with crimes perpetrated during these respective wars.[18] A significant problem for the establishment of these bodies was that the IMT and the IMTFE provided the only substantial models for such prosecutions.[19] The challenge for these modern international tribunals was that the nature of warfare had changed following WWII, and the IMT and the IMTFE could not provide direct precedents for the new ad hoc tribunals. The crimes committed in the former Yugoslavia and Rwanda did not directly parallel with those perpetrated between 1939 and 1945. These new tribunals had to adopt different and novel prosecution strategies in order to respond effectively to this challenge. Despite calls from locals to situate the respective tribunals in country, the UNSC decided to locate the

[17] Benjamin N. Schiff, *Building the International Criminal Court*, (New York, NY: Cambridge University Press, 2008), pp.37-8. Further discussion of the development of this court is found later in this chapter, in the section on the ICC.

[18] It is not intended to suggest that there had been no conflicts where war crimes had been perpetrated during the Cold War era. Simply a recognition that the UN made no attempts to deal with such issues, which were in many ways war by proxy, guaranteeing that the UNSC would never agree to the setting up of such tribunals.

[19] There was an international dimension to the Holocaust trials held in Israel and elsewhere, such as the Eichmann in Jerusalem. These trials resulted in an ongoing discussion about war crimes in international legal scholarship, which was drawn on in the 1990s. However, this thesis takes as a starting point that from the UN perspective, and that of most international lawyers, that it was the international tribunals at Nuremberg and Tokyo, which were crucial in the setting up of the ICTY and the ICTR. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (introduction by Amos Elon), (New York, NY: Penguin Books, 2006).

ICTY in The Hague, the Netherlands and the ICTR in Arusha, Tanzania, in order to maintain the necessary security for witnesses and avoid being sucked into ongoing corruption in the former Yugoslavia and Rwanda.[20]

The International Criminal Tribunal for the former Yugoslavia

The former Yugoslavia was embroiled in conflict throughout the 1990s. Starting with the death of its long-term Communist leader Marshal Josip Broz Tito in 1980, the demise of communism in Eastern Europe, and the downfall of the Soviet Union, Yugoslavia's political and economic systems came under enormous pressure. By 1989, the state collapsed. Fuelled by ethnic conflicts and faith-based insurgencies, nationalist and separatist movements grew, resulting not only in the dissolution of Yugoslavia as a state entity, but in the outbreak of war amongst and within the five successor independent states - Serbia, Croatia, Bosnia and Herzegovina, Slovenia and the Former Yugoslav Republic of Macedonia.[21] Owing to global media reportage, the abuses committed by all sides during these conflicts grew in international awareness and outrage.[22] As a result, the UNSC founded the ICTY in 1993 to prosecute alleged perpetrators of crimes against humanity, crimes of genocide and war crimes**.**[23]

The ICTY was the first post-WWII international tribunal to implement and embody the aims and objectives of international criminal justice, paving the way for other specialist international criminal tribunals, including the ICTR and the ICC.[24] The Tribunal consisted

[20] UN ICTY: https://www.icty.org/en/about/office-of-the-prosecutor/history, (accessed 31 March 2020).
[21] For a discussion of the Yugoslav Wars, see Catherine Baker, *The Yugoslav Wars of the 1990s*, (Palgrave: London, 2015).
[22] Theodor Meron, 'Rape as a Crime Under International Humanitarian Law', *American Journal of International Law*, 87(3), (1993), 424-28, p.424.
[23] UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 (amended on 17 May 2002). The terminology of war crimes is continued for this Tribunal and the ICTR because that was the terminology both these bodies used.
[24] Madelaine Chian, 'Different Models of Tribunal', in David A. Blumenthal and Timothy L. H. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence Or Institutionalised Vengeance?*,

of a Chamber, which included three Trial Chambers with three judges attached to each, and an Appeals Chamber that comprised of five judges. The latter Chamber was shared with the ICTR. The Tribunal's Registry worked with the Chambers to arrive at the agreed legal procedural rules, while the Office of the Prosecutor managed the prosecutions agreed by the Tribunal.[25]

The ICTY judges were responsible for determining the innocence or guilt of those alleged to have committed war crimes in the former Yugoslavia as well as sentencing those individuals whom they convicted. In its operations, the ICTY did follow the precedent of the IMT and IMTFE in that its key focus was on holding senior military and political figures to account for abuses perpetrated under their command.[26] During a trial, they listened to the testimony of witnesses called by both prosecution and defence during proceedings. The panels examined the evidence presented in court by the prosecution and defence and issued judgments on the basis of that evidence.[27]

From the start, the ICTY was not without opponents. Peter Verovšek remains critical of the Tribunal, both in terms of the original remit and the rules it worked out for its daily operations. One of his key points is that by situating the ICTY at The Hague, 'thousands of kilometres from the killing fields of the former Yugoslavia', evidence gathering for both sides was compromised because international tribunals do not have the authority to detain or suspects and summon witnesses.[28] Victims were prevented from independently accessing the Tribunal, diminishing the potential for their voices to be

(Boston, MA and Leiden: Martinus Nijhoff Publishers, 2008), 205-28, p.205.

[25] For details of the structure of the ICTY, see UN International Residual Mechanisms for Criminal Tribunals, specifically the material for this Tribunal, laying out the structure of responsibility available at https://www.icty.org/sites/icty.org/files/images/content/org_char_en_A4.pdf See Richard Ashby Wilson, *Writing History in International Criminal Trials*, (Cambridge: Cambridge University Press, 2011).

[26] Saeeda Verrall, 'The Picture of Sexual Violence in the Former Yugoslavia Conflicts as Reflected in the ICTY Judgments', in Baron Serge Brammertz and Michelle Jarvis, (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford: Oxford University Press, 2016), 299-335, p.315.

[27] UN ICTY: https://www.icty.org/en/about/chambers, (accessed 13 April 2020).

[28] Peter Verovšek, 'The lessons of the ICTY for transitional justice', *Eurozine*, (2018), 1-7, p.3.

heard.[29] It was seen as a problem that the terms under which the ICTY was set up made it a matter for the appointed legal members of the Tribunal rather than local experts to agree on the range of prosecutions and priorities. Local victim bodies and groups have vocalised their 'bitterness when they learn of ICTY plea bargains,' which is 'unheard of in their national legal systems.'[30] Making matters worse, the Tribunal provided no explanation to the local judiciary, let alone the wider population, for decisions over when and why to strike a plea deal.[31] Its lack of engagement with these complaints has led to nationals expressing their dissatisfaction with Tribunal's operations.[32] Frank Dame points out that many former Yugoslavians condemn the ICTY 'as a threat to the delicate balance of power in the region'.[33] They view it as an apology from the UN for letting the conflict take hold in the first place rather than an instrument of justice.[34]

Concerns have also been raised regarding the backgrounds of the judges. Though a concerted effort was made to allocate positions on the bench to individuals from around the world, Bosnia's UN ambassador, Mohamed Sacirbey, criticised the Tribunal for its lack of Muslim judges, stating that '[i]t is absurd that most of the victims are Muslim, yet they have no representatives on the Tribunal.'[35]

In a similar vein, Nienke Grossman argues that those affected by war should be adequately represented among the decision-makers, notably judges. International courts, she explains, 'exercise public authority by interpreting and shaping international law.'[36]

---

[29] Ibid.
[30] Frank Dame, 'The Effect Of International Criminal Tribunals On Local Judicial Culture: The Superiority Of The Hybrid Tribunal', *Michigan State International Law Review*, (2015), 24(1), 213-77, pp.230-1.
[31] Ibid, pp.230-1.
[32] Ibid, p.229.
[33] Ibid.
[34] Ibid.
[35] Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', *Chicago Journal of International Law*, (2012), 12(2), 647-84, p.670
[36] Nienke Grossman, 'Shattering the Glass Ceiling in International Adjudication', *Virginia Journal of International Law*, (2016), 56(2), 1-80, p.9.

Thus, '[t]he de facto law-making role played by international judges cannot be denied.'[37] This authority, she writes, must be justified, 'and democratic values such as representation provide a meaningful justification.'[38] Both men and women in affected civilian populations are supposed to be the key beneficiaries of the international tribunals and courts. As such, these populations, she insisted, should both play a role in judicial decision-making for these organs in order to hold justified authority.[39]

Sharing Grossman's view, local non-governmental organisations (NGO) with support of some interested international NGOs (INGOs), campaigned for the inclusion of female judges in the belief that this would work to ensure rape would be prosecuted as a serious crime in its own right.[40] The National Alliance of Women's Organisations, a British umbrella body that focuses on women's human rights and equality, for example, proposed '[t]hat at least 50% of the personnel involved at every level and in every aspect of the Tribunal's functions be women.'[41] The Organization of the Islamic Conferences also called for the ICTY judges to 'represent, on an equitable geographic basis, the world's major legal systems, with particular representation from the Islamic countries and with due regard to gender representation.'[42] Likewise, the Lawyers' Committee for Human Rights recommended that standards for the election of judges be 'designed to ensure diversity in terms of geographic origin, gender and religion.'[43]

The UNSC Resolutions that established the ICTY are limited in this respect. They provide almost no direction or guidance on national nominations practices and procedures, let alone on any other strategy to achieve a balance in representation on the basis of gender,

[37] Daniel Terris, Cesare P.R. Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, (Waltham, Massachusetts: Brandeis University Press, 2007), p.115.
[38] Grossman, 'Shattering the Glass Ceiling in International Adjudication', p.9.
[39] Ibid.
[40] Grossman, 'Sex on the Bench', pp.661-2.
[41] Ibid, p.662.
[42] Ibid.
[43] Ibid.

race or religion.[44] UNSCR 1329 (2000), for example, states that UN Member States and non-Member States maintaining permanent observer missions at the UN can nominate up to two candidates for permanent judges and four candidates for *ad litem* judges to the ICTY. The Resolution simply stipulates that the candidates meet the qualifications requirements and are not of the same nationality as each other or as a sitting member of the ICTR or the appeals chamber.[45] Greater detail and stronger rules would almost certainly have made it impossible to pass the necessary Resolutions through the UNSC.

Amongst other imbalances, this lack of clarification ensured that women continued to be marginalised in the initial composition of the ICTY. Though they occupied 41% of the *ad litem* positions between 1999 and 2015, women held only 11% of the permanent slots.[46] True, the UN Secretary General's Report on the establishment of the Tribunal encouraged the hiring of female staff, as did the US representative to the Security Council.[47] Conrad Harper, US State Department Legal Adviser, told the press that the Clinton Administration thought it was important that at least one woman was nominated as an ICTY judge for each panel 'because of the use of rape as an instrument of warfare in the Bosnian conflict.'[48] As targets of such abuse, he asserted, women should also judge the offenders.[49]

Though the UNSC did not initially include a requirement for gender-balanced representation in the ICTY Statute,[50] it eventually responded to such criticism. Consequently, it was later amended to mirror Article 36(8)(a) of the ICC Rome Statute (2002), which included a clause regarding gender representation. Article 13 of the ICTY's

[44] Grossman, 'Shattering the Glass Ceiling in International Adjudication', p.35.
[45] Ibid.
[46] Nienke Grossman, 'Achieving Sex-Representative International Court Benches', *American Journal of International Law*, (2016), 110(1), 82-95, p.85.
[47] Grossman, 'Sex on the Bench', p.662.
[48] Ibid, p.670-1.
[49] Ibid, p.671.
[50] Ibid, p.663.

revised Statute states that the election and appointment must provide a 'fair representation of female and male candidates'.[51] However, this provision only applies to *ad litem* judges – a judge selected to sit on a specific trial.[52] Regrettably, while over its lifespan 86 ICTY judges were appointed, only 23 of those were women.[53]

Various judges, including Patricia Wald of the former Yugoslavian Tribunal, argue that adequate gender representation is particularly important in rape cases. She insists that a judge is 'the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is adept to be sensitive to its subtle expressions or to paternalism.'[54] Former ICTR Judge Navanethem Pillay – a key figure in the prosecution of rape by the Rwandan Tribunal in the *Prosecutor v. Jean-Paul Akayesu* (1998)[55] – maintains that women 'come with a particular sensitivity and understanding'.[56] Lady Baroness Hale echoes this sentiment, stating that 'women bring different perceptions to the task of fact finding which is what most judges do much of the time'.[57]

Reflecting on these comments, Grossman refers to a study, which indicates that ICTY panels with female judges presiding prescribed 'more severe sanctions on defendants who assaulted women, while male judges imposed more severe sanctions on defendants who assaulted men.'[58] These results underline how the differences between men and women judges' own life experiences often influence the ways in which they interpret the law and their judicial decision-making in rape cases.

---

[51] ICTY Statute, Article 13(b).
[52] Ibid, Article 13(b).
[53] Gender at the ICTY**:** https://www.icty.org/en/in-focus/gender-at-the-icty, (accessed 29 August 2020).
[54] Grossman, 'Sex on the Bench', p.656.
[55] *Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, ICTR, 2 September 1998. Akayesu was originally charged with committing crimes of genocide, crimes against humanity and war crimes. Initially, gender-related crimes were not included in the indictment. The charges were only amended to include rape, amongst other acts of sexual violence, after witnesses testified that such offences had been committed during the genocide. In 1998, Akayesu was found guilty of rape and sentenced to life imprisonment. See Appendix 2.
[56] Grossman, 'Sex on the Bench', p.656.
[57] Ibid.
[58] Ibid.

Grossman points out also that at the ICTY and the shared Appeals Chamber level, out of 25 judges, eight had no prior criminal judicial experience. Of these 25 judges, a majority had no previous 'experience in international criminal law' or had less than 'fifteen years of relevant professional experience.'[59] The International Bar Association found that for many sittings of these courts, no consideration is given to whether 'candidates for appointment to international judicial office conform to the requirements for appointment according to any stated criteria.'[60] Seats at the international courts are typically used as 'bargaining chips in the diplomatic process,' where individuals 'receive votes because of the lobbying efforts and power of their states, not because of their individual achievements.'[61]

For Grossman, this lack of emphasis on qualifications and merit works negatively to affect diversity within the international courts, arguing that 'candidates have already been nominated' by the time states vote.[62] Where international courts have screening procedures, she contends, they often have more women on the bench. For example, the ICC, the European Court of Human Rights (ECHR, 1959-present), and Economic Community of West African States (ECOWAS, 1975-present), had a greater number of women judges in mid-2015, or a higher percentage of slots allotted to women from 1999, or since their establishment, whichever came later.[63] Courts and tribunals with a lower percentage of slots allotted to women, she argues, included those bodies with minimal levels of screening.[64]

Lacking such screening, courts like the ICTY end up with fewer women judges,

[59] Grossman, 'Shattering the Glass Ceiling in International Adjudication', p.56
[60] International Bar Association's Human Rights Institute, 'Background Paper to the Institute's Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals', unpublished briefing paper, 31 October 2011, para 6.
[61] Grossman, 'Shattering the Glass Ceiling in International Adjudication', p.56.
[62] Ibid, p.57.
[63] 'The WTO Appellate Body, however, had only 14% women judges in mid-2015, and 17% of judicial slots went to women.' Ibid.
[64] Ibid.

which has had implications for the choices made on any prioritisation of the prosecution of rape as a serious crime in international law. Thus LaShawn Jefferson, women's rights expert at the Ford Foundation, describes the ICTY's record on rape prosecutions as 'underwhelming'.[65] Activists, she explains, had hoped that the Tribunal 'would pursue cases of sexual violence in the former Yugoslavia as vigorously as, and on equal terms with, other crimes committed during the wars.'[66] However, the Tribunal failed to meet expectations for ensuring accountability for crimes of rape and sexual violence in the region.[67]

As a background to the setting up of the ICTY in 1993, the UNSC adopted Resolution 780 in 1992. The Resolution created a Commission of Experts to investigate violations of the Geneva Conventions and other serious breaches of international humanitarian law committed during the Yugoslavian conflict.[68] The Commission subsequently received reports of systematic rape of women, amongst other crimes. The collection of evidence and information relating to such acts amounted to 65,000 pages of documents, a database cataloguing the information in these documents, over 300 hours of videotape, and 3,300 pages of analysis, which the Commission submitted to the Prosecutor of the ICTY between April and December 1994 – four years prior to ICTY's first attempt at prosecuting rape.[69] In this context, it can be seen as a failing of the ICTY that it was the later Rwandan Tribunal that first prosecuted and came up with a definition for use in its proceedings, despite the lower public profile accorded globally to this conflict.[70]

Despite such shortcomings, the ICTY did break new ground. Building on the

[65] LaShawn R. Jefferson 'In War as in Peace: Sexual Violence and Women's Status', in *Human Rights Watch: World Report 2004*, (New York, NY: Human Rights Watch, 2004), p.338.
[66] Ibid.
[67] Ibid.
[68] Mia Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda*, (Johannesburg: Bakwena Printers, 2016), p.29.
[69] Ibid.
[70] It was also the first to bring a prosecution for rape in *Akayesu (Trial Judgment)*.

precedent already set by the ICTR in *Akayesu*, the former Yugoslavian Trial Chamber created its own definition of rape in the *Prosecutor v. Anto Furundžija* (1998),[71] where the accused, a commander of a special unit of the Croatian Defence Council was prosecuted for commissioning acts of rape against Bosnian Muslim detainees. The *Furundžija* definition described rape in so-called 'mechanical' terms, referring to the specific acts, body parts and objects used in rape:

> (i) the sexual penetration, however slight:
>
> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
>
> (b) of the mouth of the victim by the penis of the perpetrator;
>
> (ii) by coercion or force or threat of force against the victim or a third person.[72]

This definition was later revisited by the ICTY in the *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (2001),[73] where the defendants were tried for their roles in the commission of crimes against the Bosnian Muslim civilians between 1992 and 1993. The Trial Chamber agreed to remove reference to 'coercion or force or threat of force against the victim or a third person' from the definition.[74] Instead, it added 'where such sexual penetration occurs without the consent of the victim'.[75] This

[71] *Prosecutor v. Anto Furundžija (Trial Judgment)*, IT-95-17/1-T, ICTY, 10 December 1998. Although Furundžija did not personally rape detainees, he was found guilty of aiding and abetting outrages of personal dignity, including the commission of rape and sentenced to ten years' imprisonment.
[72] Ibid, para 185.
[73] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001. Kunarac, Kovač, and Vuković were charged for their roles in the commission of crimes against the Bosnian Muslim civilians between 1992 and 1993. Kunarac was sentenced to 28 years' imprisonment for crimes against humanity (torture, rape, enslavement), and war crimes (torture and rape). Kovač was sentenced to 20 years' imprisonment for war crimes of rape and outrages upon personal dignity, and crimes against humanity of enslavement and rape. Vuković was found guilty of torture and rape as war crimes and crimes against humanity and sentenced to twelve years' imprisonment.
[74] Ibid, paras 438,459.
[75] Ibid, para 460.

amendment was intended to provide an advanced conceptualisation of rape compared to many civil and common law jurisdictions.

Significantly, the judges in these cases can be shown to have played a pivotal role in the development of the definitions of rape within these Tribunals. Presiding in the *Furundžija* case for the ICTY was Judge Florence Ndepele Mwachande Mumba (Zambia) – the only female judge on the bench. She sat alongside Judge Antonio Cassese (Italy) and Judge Richard May (UK). Judge Mumba again presided in *Kunarac*, with her male colleagues Judge David Hunt (Australia) and Judge Fausto Pocar (Italy). In consultation with the Registry, these judges examined the criminal codes of their own nation state when constructing the *Furundžija* and *Kunarac* definitions of rape.[76]

These outcomes reinforce the emphasis given earlier on the practical importance of adequate gender representation on benches hearing rape cases. Indeed, Wald's opinion that it is a given that a judge's politics or origin will affect their judicial opinion and choices is plainly substantiated by this evidence of the role played by Judge Mumba. It underlines Wald's experience-based observation that a judges' mind is not compartmentalised: they do not perform their duties by using some sort of 'insulated, apolitical internal mechanism.'[77] It is clear that the 'institutional culture of the Chambers is influenced inter alia' by a judge's personal and professional background.[78] This point is particularly pertinent given that, early on in the ICTY's operations, the Tribunal judges were

[76] The *Furundžija* ICTY examined the definitions of rape found in the case law and penal codes of Argentina, Australia, Austria, Bosnia and Herzegovina, Chile, China, England and Wales, France, Germany, India, Italy, Japan, the Netherlands, Pakistan, the Socialist Federal Republic of Yugoslavia, South Africa, Uganda and Zambia; see *Furundžija (Trial Judgment)*, fns 207-14. It provides no justification or explanation for its selection. See Oosterveld, 'Influence of Domestic Legal Traditions', pp.828-30. The additional penal codes within the following states were also examined in *Kunarac*: Bangladesh, Belgium, Brazil, Canada, Costa Rica, Denmark, Estonia, Finland, Korea (region not specified), New Zealand, Nicaragua, Norway, the Philippines, Portugal, Sierra Leone, Spain, Sweden, Switzerland, the US and Uruguay. Ibid, paras 443-4; 447-51; 453-56. See Oosterveld, 'Influence of Domestic Legal Traditions', p.831.
[77] Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda*, p.115.
[78] Ibid.

predominantly academics or long-serving appellate judges. By 2016, the Tribunal judges had more varied professional and personal backgrounds.[79] Continuing to reflect along these lines, Mia Swart's comment is useful as a reminder to the researcher: '[i]t remains instructive to look at whether the judges have experience in trying criminal cases or whether the judges are diplomats or judges with a more academic background in international law.'[80] Whether a judge comes from a common or a civil law background is also important, because undoubtedly these factors will impact their decision making actions.[81]

Their affiliation with or being a member of particular organisations is equally informative. For example, Judge Mumba, who presided over both the *Furundžija* and the *Kunarac* trials, is a member of the UN Commission on the Status of Women (UNCSW, 1946-present). One of the concerns of the Commission was the Yugoslavian Wars and the reports of systematic mass rape.[82] In the *Furundžija* Appeals Chamber Decision, the Appellant alleged that Judge Mumba's original decision promoted specific interests and goals of the Commission making the judgement political. As result, he argued that Judge Mumba should be disqualified. The Appellant claimed that Judge Mumba acted improperly when she advocated the 'position that rape was a war crime, and encouraged the vigorous prosecution of persons charged with rape as a war crime.'[83] Moreover, he stated that the definition of rape that emerged in the case was a reflection of the views of the Expert Group Meeting, which followed the UN Conference on Women held in Beijing, of which Judge Mumba attended.[84]

Though the Appellant's argument was dismissed by the Appeals Chamber, their

[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid, p.109
[83] Ibid, p.111. The Appellant's claim was not upheld.
[84] Ibid.

assertion underpins the arguments made by Wald and Swart to the effect that we must always consider the potential for judges to be influenced by their own legal-cultural background.

The International Criminal Tribunal for Rwanda

As with the Yugoslav Wars, the genesis of the Rwandan conflict is rooted in political and economic unrest within the region, and an examination of the ICTR reveals similarities with the setting up and development of the ICTY.[85] A by-product of European decolonisation in Africa during the mid-to-late 1950s and 1960s, the Rwandan state was polarised between the newly politically and numerically dominant Hutu people and less numerous and formerly powerful Tutsis.[86] By 1990, tensions rose between the Rwandan Armed Forces, representing the government of Rwanda, and the rebel alliance, the Rwandan Patriotic Front (RPF), resulting in the outbreak of civil war. After the assassination of President Juvénal Habyarimana (1973-1994), the Hutu majority government ordered the mass slaughter of the Tutsi people over a period of 100 days.[87] It was not until the RPF gained control of the state that the genocidal campaign against the Tutsis ended in late 1994.[88]

The UN drew strong criticism from the international community for its lack of effective intervention in the conflict. The United Nations Assistance Mission for Rwanda (UNAMIR, 1993), in particular, was deemed a failure for not implementing

[85] Daniel Evans, *International Affairs and Intelligence Studies Primer*, (Savannah, GA and Raleigh, NC: Evans Analytics, 2011), p.64.
[86] For discussion on the historical context of the Rwandan conflict, see for example, Gerard Prunier, *The Rwanda Crisis, 1959-1994: History of a Genocide*, (London: C. Hurst & Co. Publishers, 1995).
[87] 'Rwanda: How the genocide happened', *BBC News*, 17 May 2011: https://www.bbc.co.uk/news/world-africa-13431486, (accessed 2 August 2019).
[88] See generally Gerard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*, (Oxford: Oxford University Press); Prunier, *The Rwanda Crisis, 1959-1994*.

the Arusha Accords (1993) and ending the civil war.[89] To redeem its reputation, the UNSC accepted the task of not only investigating these events, but also creating a similar tribunal to the ICTY in order to prosecute offenders and secure justice for victims.[90]

The headline link between the ICTY and the ICTR is functional, not legal, in that the Rwandan court was also not located within the conflict-affected region. Instead, it was based in Arusha, Tanzania. Again, it consisted of three Trial Chambers, an Appeals Chamber (shared with the ICTY, which meant that it operated in The Hague), a Registry and the Office of the Prosecutor. Though they had previously shared the prosecutor and appellate judges, since 2007, the ICTY and the ICTR have had separate prosecutors as well as trial judges, administrative organs and budgets.[91]

There are clear differences in the approach to conflict-perpetrated rape between the two Tribunals, rooted in a reality that when the ICTR was established, its personnel were conscious of, and willing to take into account, early criticisms of the ICTY when shaping this new tribunal. So rather than simply modelling the Tribunal upon its predecessor, ICTR was consciously intended to represent an improved body. This point is underlined by the explanations provided by several representatives at the UNSC, who advertised that in creating the Rwandan Tribunal, the Council was deliberately not replicating the ICTY. The French delegate emphasised the importance of taking into consideration the particular and different needs of Rwanda.[92] The representative of New Zealand stressed that '[m]any important changes have been made to the framework of the Tribunal. We did not simply produce an add-on to the former-Yugoslavia Tribunal; the Council recognized that there

[89] Chiyuki Aoi, *Legitimacy and the Use of Armed Force: Stability missions in the post-Cold era*, (Abington: Routledge, 2011), p.85.
[90] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Antwerpen and Oxford: Intersentia, 2005), p.15.
[91] Medecins Sans Frontieres: https://guide-humanitarian-law.org/content/article/3/international-criminal-tribunals-for-the-former-yugoslavia-icty-and-rwanda-ictr/, (accessed 31 March 2020).
[92] UN Doc. S/PV.3453, 8 November 1994, p.3.

are important differences between the two situations.'[93] Notably, the focus of the ICTR's jurisdiction was intended to focus on crimes of genocide rather than war crimes, as Rwanda had requested.[94] As such, the ICTR and ICTY were each responsible for drawing up their own legal rules in response to local realities. Decisions taken by one were not binding on the other.

In this context, it is not easy to make direct comparisons between the two Tribunals. However, scholars like Rebecca Haffajee regard the Tribunal as having advanced war crimes prosecutions in international law.[95] Like the ICTY, ICTR did establish a principle that ordinary soldiers and militia members who committed mass atrocities during the civil war were acting under the order of political and military leaders, insisting on attaching blame to authority figures rather than those simply acting under their orders. In turn, the ICTR prosecuted high-ranking officials for crimes against humanity, crimes of genocide and war crimes.[96] This strategy meant that top officials were held accountable for acts attributed to them, even if not directly committed by them. Such prosecutions have been described as revolutionary, addressing the pervasive unwillingness of these leaders to hold soldiers responsible for their acts.[97] Others, notably Lilian Barria and Steven Roper, are less convinced about the extent to which ICTR can be regarded as a more successful body than ICTY. They point out that in contrast to the Yugoslavian Tribunal, the Rwandan Tribunal's mandate is narrow, being limited to crimes committed only during one calendar year, and in Rwanda instead of looking at the entirety of the conflict from 1990 until

[93] Ibid, p.5.
[94] Ibid.
[95] Rebecca L. Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory', *Harvard Journal of Law and Gender*, (2006), 29, 201-21, pp.201-2.
[96] Ibid.
[97] Catharine A. MacKinnon, 'The ICTR's Legacy on Sexual Violence', *New England Journal of International and Comparative Law*, (2008), 14(2), 211-20, p.214.

1994.[98] Wald is another critical commentator on the operations and thinking of the ICTR. In line with her comments on the ICTY, her focus on the ICTR is again on the issue of gender, specifically the underrepresentation of women, and the need to consider the cultural and legal backgrounds of legal personnel, notably judges.[99] Echoing Wald, Grossman points out that while the number of women *ad litem* judges sitting at the Rwandan Tribunal reached 60% in 2004, by 2011 numbers plummeted to 20%,[100] raising similar concerns to those outlined earlier in the chapter, particularly with regards to rape prosecutions.

Mirroring coverage of the Yugoslavian war, media outlets and I/NGOs reported on the extensive use of rape as a weapon during the Rwandan genocide when demanding that perpetrators be held accountable for their crimes. By 1996, the pressure to act from the media, channelling the evidence provided to them by those on the ground, was overwhelming. But the insistence on enabling justice delivery aimed at the ICTR was more nuanced in its detail than that pressing for action by the ICTY. Human Rights Watch, for example, explicitly appealed to the ICTR to integrate a gender perspective into its investigations by hiring more women investigators, treating rape as a serious crime and amending indictments to include rape charges where appropriate. Adding momentum to the demands for a more conscious gender dimension to the Tribunal, feminist activists founded the Coalition for Women's Human Rights in Conflict Situations to ensure that the interests and rights of those women appearing before the ICTR were protected.[101] This more detailed and specific set of demands made of the ICTR helps to explain why it was

[98] Lilian A. Barria and Steven D. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR', *International Journal of Human Rights*, (2005), 9(3), 349-68, p.349.
[99] Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', p.671.
[100] Grossman, 'Shattering the Glass Ceiling in International Adjudication', p.29.
[101] Beth Van Schaack, 'Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda', Human Rights Advocacy Stories, Foundation Press, (2008); Santa Clara University Legal Studies Research Paper No. 08-55: https://ssrn.com/abstract=1154259, p.8.

the ICTR, rather than the ICTY, which first responded to pressure by arriving at a definition of rape for use within the Trial Chamber.

Despite these calls for a more conscious gender dimension to its thinking, the Rwandan Tribunal did initially overlook the claims for bringing prosecutions headlining rape committed during the conflict. For example, Akayesu, the mayor of the Taba commune and one of the most powerful figures within his community at the time, was originally charged only with ordering, inciting, or instigating international crimes, ignoring the evidence that he had instigated substantial numbers of acts of rape.[102] It was not until the trial commenced that the indictment was changed to include rape and, again, a woman judge was key to this development. After witnesses testified that the accused was present while Tutsi members of the Tabe Commune had been raped by Interahamwe, South African Judge Navanethem Pillay – the only woman sitting on the bench alongside presiding Judge Laïty Kama (Senegal) and Judge Lennart Aspegren (Sweden) – pressed for further information.[103] Whilst Pillay pursued these details, local women's NGOs, such as the Institute for Women's Health and Rehabilitation (IWHR) as well as the Coalition, developed briefs for consideration by the Tribunal, which outlined the need to include rape among the charges against Akayesu. In providing its Judgement, the Trial Chamber specifically reflected on the key points raised by feminists involved in the case, including 'that rape should be defined in a broad and progressive manner.'[104]

[102] Ibid, p.1.
[103] Ibid, p.6; Richard J. Goldstone, 'Prosecuting Rape as a War Crime,' *Case Western Reserve Journal of International Law*, (2002), 34(3), 277-86, p.282.
[104] Louise Chappell, 'Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court', *Policy and Society*, (2003), 22(1), 3-25, p.10; Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda*, p.224.

As part of Akayesu's prosecution for ordering acts of rape against the Tutsi tribe members, the Trial Chamber created a so-called 'conceptual' definition of rape.[105] In other words, the ICTR described the broader harms associated with rape, rather than the specific acts, body parts and objects used in rape, something that was deemed a better echo of its remit to focus on genocide.[106] The Trial Chamber stated that rape constitutes 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[107] Acts 'which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual' are included in the definition (See Appendix 1).[108] This definition is significant because it includes acts such as the 'thrusting a piece of wood into the sexual organs of a woman as she lay dying',[109] a technique often used by the Hutu paramilitary organisation, the Interahamwes.[110]

The different approaches taken by the ICTY and the ICTR when seeking to define rape, accompanied as it is by the evidence of the impact of individual judges on those approaches, underlines the difficulties associated with constructing an agreed definition of rape in international law. This lack of consensus from these Tribunals is particularly significant because of the impact they have had on the agendas of other post-conflict organs, which have sought to prosecute rape, including the ECCC. A brief survey of this

[105] *Akayesu (Trial Judgment)*, paras 597,687. This also drew on the torture convention, which will be addressed in full detail in Chapter 7.
[106] Ibid.
[107] Ibid, para 598; 688.
[108] Ibid, paras 596; 686. Sexual violence had an even broader definition: 'any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.' Forced nudity is an example of a sexually violent act which 'does not involve touching'. See ibid, para 688.
[109] Ibid, para 686.
[110] The Interahamwe ('Those Who Attack Together') was founded in 1994 as the youth wing of the National Republican Movement for Democracy and Development (MRND), the reigning party of Rwanda, and was backed by the Hutu majority government. 'Trained and supplied by the Rwandan army, the militias were involved in the killing of more than 2,000 civilians, mostly Tutsi [in 1992]. They would play a central role in the atrocities that commanded the world's attention in 1994' (USIP Jan. 1995). United States Bureau of Citizenship and Immigration Services, *Rwanda: Information on the role of the Interhamwe [also Interahamwe] militia and the use of roadblocks during the 1994 Rwandan genocide*, 14 August 2001, RWA01001.OGC.

legacy dimension amply illustrates the ongoing continuation of the historical confusion and disagreements in international law over prosecutions for rape perpetrated in conflict situations.

Extraordinary Chambers in the Courts of Cambodia

Unlike the ICTY and the ICTR, the ECCC was established in country, at Pnom Penh. Set up in 1997, it has only been active since 2006. The Court was created to prosecute senior members of the Democratic Kampuchea (the Khmer Rouge regime). These figures were those considered 'most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.'[111] Although a hybrid court created by the Royal Government of Cambodia and the UN, the ECCC remains an independent body, using Cambodian[112] as well as international staff as part of its broader strategy to apply international standards.[113]

The ECCC is of relevance to this thesis because of the explicit reference made by it to the work of the ICTY and the ICTR. In determining what constitutes rape, the Trial Chamber in the *Prosecutor v. Kaing Guek Eav* (2010) concluded that the ICTY *Kunarac* definition provides a more accurate description than the *Akayesu* definition.[114] It also relied on the jurisprudence of both the ICTY and the ICTR when categorising rape as a form of

[111] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, (NS/RKM/1004/006), Article 1.
[112] The involvement of Cambodian staff was made easier by the in-country location, which had been a criticism of both ICTY and ICTR.
[113] For background on the ECCC, see Rebecca Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia*, (Cham: Palgrave Macmillan, 2019).
[114] *Prosecutor v. Kaing Guek Eav (alias Duch) (Judgment)*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, ECCC, 26 July 2010, fn 666.

torture.[115] These outcomes are an indication of the value and influence of both the Tribunals with regards to rape prosecution.[116] The ECCC's record also reveals the extent of the challenges facing that Court, which is made comprehensible by reference to a wider cultural context and the impact of that context on legal attitudes. To date, the Court has only prosecuted one case of rape in the *Kaing Guek Eav* trial, heard by a male-dominated bench, including Judge Nil Nonn, (President, Cambodia), Judge Silvia Cartwright (New Zealand), Judge Ya Sokhan (Cambodia), Judge Jean-Marc Lavergne (France) and Judge Thou Mony (Cambodia).[117] The accused was found guilty of rape as a crime of torture and given a single sentence of 35 years imprisonment.[118]

In general terms, the ECCC is judged to have achieved little since its inception. To date, the Court has prosecuted and convicted only three individuals.[119] Its lack of focus on crimes of rape committed during the Khmer Rouge era has been particularly criticised by the international community. Interestingly, given the points made about the impact of national culture on legal thought and action, this absence can be linked to traditional Cambodian domestic culture and law. In Cambodia, attitudes towards rape remain rooted in expectation of women's relative subordination to men, making its prosecution complex. Rebecca Surtees refers to the 'socially charged nature of the crime in Cambodian society', where women themselves are likely to be blamed for providing any opportunity for rape.[120]

[115] Ibid, fns 666-70.
[116] For comment on the ECCC's decision to apply the *Kunarac* definition of rape, see Oosterveld and Sellers, 'Issues of Sexual and Gender-Based Violence at the ECCC'.
[117] *Kaing Guek Eav (Judgment)*.
[118] Ibid, para 677. See The Hague Justice Portal: http://www.haguejusticeportal.net/index.php?id=8572#:~:text=Kaing%20Guek%20Eav%2C%20alias%20Duch,Cambodia%20between%201975%20and%201979.&text=In%20a%20Decision%20on%205,the%20Closing%20Order%20against%20Duch, (accessed 31 August 2020).
[119] See *Case 001 (Judgment)*, 001/18-07-2007/ECCC/TC, ECCC, 26 July 2010; *Case 002/01 (Judgment)*, 002/19-09-2007/ECCC/TC, ECCC, 7 August 2014; *Case 002/02 (Judgment)*, 002/19-09-2007/ECCC/TC, ECCC, 16 November 2018.
[120] Rebecca Surtees, 'Rape and Sexual Transgression in Cambodian Society', in Linda Rae Bennett and Leonore Manderson (eds), *Violence Against Women in Asian Societies: Gender Inequality and Technologies of Violence*, (London: Routledge, 2018), 93-114, pp.93; 104-9.

Though rape is criminalised under the Cambodian Criminal Code of 1956, what constitutes rape in the context of the ECCC remains unclear. This dimension is complicated by the local tradition where what would be identified in modern Western thinking as a form of forced marriage, works to obliterate any pre-marital sexual impropriety or offence, including rape.[121] A further complication is that in the national code, sexual violence is legally identified as more of an aspect of domestic violence than an individual crime in its own right in Cambodian culture. This identification has, from the perspective of a locally-based hybrid court, the effect of obscuring not only the potential for occurrence of male-male rape, but also for males as well as females to be forced into marriage, thereby removing a legal basis for a rape charge to be brought.[122]

While it is clear the Khmer Rouge capitalised upon this tradition by using rape and forced marriage as a form of social engineering,[123] the ECCC had initially decided not to investigate forced marriage and rape. That decision worked substantially to promote a linkage between the Chamber's policy and a culture-based assumption that the Khmer Rouge had not condoned such acts.[124] The Court later changed its position following sustained pressure from the lawyers for the Civil Parties.[125] Even then, the scope of the

[121] Cathy Zimmerman, *Plates in a Basket will Rattle: Domestic Violence in Cambodia*, (Phnom Penh: The Asia Foundation, 1994), p.69.
[122] Oosterveld and Sellers, 'Issues of Sexual and Gender-Based Violence at the ECCC', p.323-6.
[123] Ibid.
[124] Valerie Oosterveld, 'Forced Marriage during Conflict and Mass Atrocity', in Fionnuala Ní Aoláin, Naomi Cahn, Dina Francesca Haynes, and Nahla Valji (eds.), *The Oxford Handbook of Gender and Conflict*, (Oxford: Oxford University Press, 2018), 240-52, p.245.
[125] On 7-8 December 2011, survivors and witnesses of sexual violence under the Khmer Rouge and gender-based violence experts provided evidence to a panel of inter(national) experts from various different fields including women's rights and human rights. In its closing statement, the panel provided recommendations to the ECCC, the UN, the Royal Government of Cambodia and local civil society on actions needed to increase access to justice for survivors of sexual violence during Khmer Rouge rule, including ending impunity for crimes of sexual violence. Survivors noted that the Women's Hearing provided one of the first opportunities to discuss publicly rape committed during the Khmer Rouge era and, in turn, to promote a better understanding of the prevalence and gravity of the crime.
In light of its success, another Expert Panellist session was held at the Asia-Pacific Regional Women's Hearing on Gender-Based Violence in Conflict on 10-11 October 2012 in Phnom Penh. The Hearing sought to provide an additional platform for gender-based violence survivors to voice their issues whilst 'offering a comparative perspective on questions of shared concern.' The countries that participated in the panel included Cambodia, Timor-Leste, Bangladesh and Nepal. The benefit of these types of hearings is

investigation was broadened to include only forced marriage and rape within those marriages.[126] The challenge this provides for a consensus on rape in international law is revealed by the comments of experts like Sarah Deibler. She argues that this development fails to go far enough to reflect the reality of rape in Cambodia during that era. Despite rape forming 'a significant body of crimes perpetrated by the Khmer Rouge' and its being 'singled out as grounds for conviction in ECCC law', Deibler maintains that this limited focus by the Court on such crimes means that the legal response has been insufficient.[127] By taking the stance that 'only rape in the context of forced marriage can be charged as the crime against humanity or other inhumane acts', she insists that the many other instances of rape perpetrated during the Khmer Rouge regime are condoned by being overlooked in this way.[128]

The Special Court of Sierra Leone

The workings of the SCSL also reveal the wider impact of the ICTY and the ICTR. From 1991 until 2002, Sierra Leone was convulsed by civil war. During the conflict, the Revolutionary United Front, a paramilitary group headed by Foday Sankoh, used mass rape, sexual slavery and forced marriage, among other crimes, to incite mass terror and

---

that local survivors can tell their story and have their voices heard by the international community as well as locally. 'Asia-Pacific Regional Women's Hearing on Gender-Based Violence in Conflict', Background Paper, Phnom Penh, Cambodia, 10-11 October 2012, p.4. For further information, see Dianne Otto, 'Beyond legal justice: some personal reflections on people's tribunals, listening and responsibility', *London Review of International Law*, (2017), 5(2), 225-49.

[126] Valerie Oosterveld and Patricia Viseur Sellers, 'Issues of Sexual and Gender-Based Violence at the ECCC', in Simon M. Meisenberg and Ignaz Stegmiller (eds.), *The Extraordinary Chambers of the Courts of Cambodia: Assessing their Contribution to International Criminal Law*, (The Hague: Asser Press, 2016), 321-52, p.326.

[127] Sarah Deibler, 'Rape by Any Other Name: Mapping the Feminist Legal Discourse Regarding Rape in Conflict Onto Transitional Justice in Cambodia', *American University International Law Review*, (2017), 32(2), 501-37, p.507; see Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, (NS/RKM/1004/006), Article 5.

[128] Deibler, 'Rape by Any Other Name', p.504.

secure control of the state's diamond mines.[129] Charles Taylor, then president of Liberia (1997-2003), backed the insurrection, providing weapons and training to the Revolutionary United Front in return for diamonds. The Civil Defense Force, a Sierra Leone parliamentary organisation led by Sam Hinga Norman, also committed serious crimes. In 1999, the UN negotiated the Lome Peace Accord between the warring groups, marking the end of the conflict, and the start of post-conflict peacebuilding.[130]

As part of this process, in 2002, the UN at the request of the Sierra Leone Government established the SCSL.[131] Another hybrid court, and also locally based in Sierra Leone until its dissolution in 2013, the SCSL was responsible for prosecuting alleged perpetrators of serious crimes, including rape, under international humanitarian law and Sierra Leonean law between 1996 and 2002.[132] Originally envisioned as a key tool in the reconciliation and justice process, restoring the rule of law following a decade-long battle, the Court is not without its critics.[133] Dubbed the 'not so Special Court for Sierra Leone',[134] the SCSL's narrow mandate meant fewer offenders were prosecuted. Commentators such as Tom Perriello and Marieke Wierda argue that 'the numbers tried amount to no more than a symbolic measure of justice'.[135]

The ways in which the SCSL built on the precedent established by the ICTY, the ICTR and also the ICC are informative about the extent of the impact of these three

[129] Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments', *Cornell International Law Journal*, (2011), 44, 49-74, p.50.
[130] For a discussion on the Sierra Leone Civil War, see Julius Mutwol, *Peace Agreements and Civil Wars in Africa: Insurgent Motivations, State Responses and Third-Party Peacemaking in Liberia, Rwanda, and Sierra Leone*, (Amherst, NY: Cambria Press, 2009).
[131] The Charles Taylor trial was moved to The Hague because the SCSL did not have the required capacity to deal with the accused under the terms of its statute.
[132] UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, Article 1.
[133] See for example, Rachel Kerr and Jessica Lincoln, 'The Special Court for Sierra Leone Outreach, Legacy and Impact Final Report', War Crimes Research Group Department of War Studies, (2008).
[134] Sulakshana Gupta, 'The not so Special Court for Sierra Leone', *New Internationalist*, 2 November 2009: https://newint.org/columns/essays/2009/11/01/special-court-sierra-leone, (accessed 2 August 2019).
[135] Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny*, (The Hague: International Center for Transitional Justice, 2006), p.3.

specialist international courts. In the *Prosecutor vs Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)* (2007),[136] Justice Julia Sebutinde (Uganda, presiding), Judge Justice Richard Lussick (Samoa) and Justice Teresa Doherty (Northern Ireland) found each of the accused guilty of rape as a crime against humanity.[137] Throughout the Judgment, reference is made to the rape prosecutions tried by the Tribunals of the former Yugoslavia and Rwanda. When clarifying what constitutes rape, the Trial Chamber applied the ICTY *Kunarac* definition of rape.[138] Two years later, in the *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)* (2009),[139] heard by Hon. Justice Pierre Boutet (presiding, Canada), Judge Hon. Justice Benjamin Mutanga Itoe (Camaroon) and Hon. Justice Bankole Thompson (Sierra Leone), each of the accused were found guilty of rape as a crime against humanity. Like the previous case, the male only panel referred to the jurisprudence of the ICTY, the ICTR and the ICC when establishing rape as a crime in international law, and chose to use the first two elements of the ICC definition of the offence (Appendix 1).[140] Three years on, in the *Prosecutor v. Charles Ghankay* (2012)[141] Justice Richard Lussick (presiding, Samoa), and once again Justice Doherty (Northern Ireland) sitting alongside Justice Julia Sebutinde (Uganda), found the accused guilty of rape as a crime against humanity (Count 4) and outrages upon personal dignity (Count 6), which included rape, though this charge was not

[136] *Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused),* SCSL-04-16-T, SCSL, 20 June 2007.
[137] Ibid, paras 2114; 2117; 2121.
[138] *Brima et al. Judgment*, para 693.
[139] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment),* Case No. SCSL-04-15-T, SCSL, 2 March 2009.
[140] The Trial Chamber added to the definition the qualifier that the accused must be found to have 'intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and… knew or had reason to know that the victim did not consent.' It also amended the term 'perpetrator' to the 'accused'. Other inconsequential changes include the deletion of particular commas from the ICC's second element and its decision not to use 'the ICC's footnote after the term "genuine consent" in its elements, but the SCSL referred to the content of that footnote in a footnote.' Ibid, para 145; fn 293. Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone', fn 41.
[141] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-1-T, SCSL, 18 May 2012.

made explicitly clear in the Disposition.[142] During the proceedings, the Trial Chamber, once again, referred to the earlier judgments delivered by the ICTR and the ICTY. Here, however, the *Kunarac* definition of rape was applied.[143]

Like the ECCC, the decision of the SCSL panels in these cases to rely on the rape jurisprudence of the ICTY, the ICTR and the ICC establishes the powerful legacy of these bodies in relation to the prosecution of rape by other international specialist courts.

The International Criminal Court

The previous section mentioned the wider impact of the ICTY and the ICTR as well as ICC. Attention now turns to this international body, including a consideration of how these two Tribunals had an impact on the shape and subsequent development of the ICC. As mentioned at the start of this chapter, the international community had planned to create a permanent ICC in the early days of the UN. Advising on this matter was the International Law Commission (ILC, 1947-present). The UN established the ILC to monitor and promote the codification of developments in international criminal law and to draw up an appropriate criminal code.[144] Though a draft code had been produced in 1954, it had been tabled almost immediately given the practical impossibility of achieving international agreement during the Cold War.

[142] Ibid, paras 134; 431; 6994.
[143] Ibid, para 415. Clarifying the consent element, the Trial Chamber referred to Rule 96 of the Rules of Procedure and Evidence of the Residual Special Court for Sierra Leone, ibid para 417.
[144] The need for such a body had been mooted in 1942 as part of the discussions on the need for a new international body to replace the League of Nations, and an informal committee had been set up. But the formal establishment came in 1947. See Jeffrey Morton, *The International Law Commission of the United Nations*, (South Carolina, SC: University of South Carolina Press, 2000); William A. Schabas, *An Introduction to the International Criminal Court: Fifth Edition*, (Cambridge, Melbourne, Delhi and New York, NY: Cambridge University, 2017), pp.7-8.

It was not until the early 1980s that the General Assembly revived the idea of such a court, and requested that the ILC continue its work on drafting the code.[145] By this time, the prosecution of perpetrators of war crimes was no longer a priority in UN member thinking. Following developments in travel and communication from the end of the 1970s, the perpetration of transnational crime by international criminal organisations had increased. It was the shared concern of the UNSC Members over this issue that plans to create an ICC were reignited. In 1991, the UNSC asked the ILC to draft a statute for the creation of an institution that could tackle all types of international crimes. Particular attention was paid to crimes of cross-border drugs and human trafficking as well as international commercial fraud, which were then the main concerns of the international community, transcending the barriers provided by the Cold War.[146]

A rise in inter and intra-state conflict and its reportage following the end of the Cold War forced a return to the original purpose for any ICC.[147] Its primary objective was, once again, to render future specialist international criminal tribunals like the ICTY and the ICTR unnecessary. In 2002, the ICC was established under the Rome Statute. The Court is responsible for prosecuting individuals alleged to have committed crimes against humanity, crimes of genocide and war crimes.[148] Sitting at The Hague – viewed by the UN and its Western allies at least as the 'legal capital of the world' – the former UN Secretary-General, Boutros Boutros-Ghali, justified the UN's choice by claiming that 'The Hague

[145] The reference to Offences was changed in 1991 to Crimes.
[146] Report of the International Law Commission UN GAOR 46th session, 1994 'Draft Code of Crimes': http://legal.un.org/ilc/guide/7_4.shtml, (accessed 7 September 2019).
[147] See Morton, *The International Law Commission of the United Nations*; Schabas, *An Introduction to the International Criminal Court*, pp.7-8. Report of the International Law Commission UN GAOR 46th session, 1991 'Draft Code of Crimes'; See M. Cherif Bassiouni and William Schabas (eds), *The Legislative History of the International Criminal Court*, 2 vols. (Leiden, Brill: 2016).
[148] In contrast to the ICTY and the ICTR, the ICC is a 'treaty-based tribunal with competence limited core crimes perpetrated either on the territory of a Member State to the Rome Statute or by nationals of a Member State.' Triestino Mariniello, '"One, No one and one hundred thousand": Reflections on the Multiple Identities of the ICC', in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity*, (London: Routledge, 2015), 1-14, p.1.

has been an international city and a centre of legal knowledge for several centuries' and, as such, is an appropriate setting for the Court.[149]

The global validity of such claims is questionable. From the start, widely-consumed non-Western media outlets like *Al Jazeera* raised concerns. They claimed that '[t]he ICC, just like the larger international legal order within which it operates, is Eurocentric and the world views, perspectives and standpoints it reflects and embeds are uncompromisingly European'.[150] For such critics, this choice of location only compounded the ongoing problems associated with perpetuating an international legal perspective, which was reflective of a cultural imbalance. Described as a 'tool of Western imperialism', a number of Member States who were initially supportive of the ICC have since accused the Court of deliberately focusing their attentions on non-Western states, particularly those in Africa, to promote such imperialist values.[151] It is because of these issues that some Member States have submitted their notice of intended withdrawal from the ICC.[152] Supporters of the Court, on the other hand, insist that such responses are indicative not of a lack of global jurisprudential unity, but rather of contingency and of political expedience

[149] The Hague Hearing Centre: https://www.thehaguehearingcentre.com/why-the-hague/, (accessed 31 March 2020).
[150] Awol K. Allo, 'The ICC's problem is not overt racism, it is Eurocentricism', *Al Jazeera*, 28 July 2018: https://www.aljazeera.com/indepth/opinion/icc-problem-simple-racism-eurocentricism-180725111213623.html, (accessed 31 March 2020).
[151] Mark Kersten, 'Why is the International Criminal Court stepping out of Africa and into Georgia?', *The Washington Post*, 5 February 2016: https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/05/why-is-the-international-criminal-court-stepping-out-of-africa-and-into-georgia/?noredirect=on&utm_term=.909642a27566, (accessed 2 August 2019); Matt Killingsworth, 'International Criminal Court is not just for hunting Africans', The Conversation, 12 September 2013: http://theconversation.com/international-criminal-court-is-not-just-for-hunting-africans-18072, (accessed 2 August 2019); Ugumanim Bassey Obo and Dickson Ekpe, 'Africa and the international criminal court: A case of imperialism by another name', *International Journal of Development and Sustainability*, (2014), 3(10), 2025-36.
[152] Between 2016 and 2019, the Philippines, Burundi, Gambia and South Africa submitted their notice of withdrawal from the ICC. See Press Release, 'ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law', ICC, ICC-CPI-20180320-PR1371, 20 March 2018: https://www.icc-cpi.int/Pages/item.aspx?name=pr1371, (accessed 5 September 2019); M. Cherif Bassiouni, Kamari Maxine Clarke, Richard Dicker and David Scheffer, 'Invited Experts on Withdrawal Question', *International Criminal Court Forum*, (2016-2017): https://iccforum.com/withdrawal, (accessed 2 August 2019).

on the part of states and their political leaders trying to avoid justified prosecution.

The strength of this defence of the ICC is open to challenge. To date, states including the US, Israel, Russia and China have struggled to achieve an agreed stance on what constitutes a crime in international law. As a result, these countries refuse to submit to the remit of the Court and have declined membership to ensure that they could not be forced to accept its decisions and judgments. For Catherine Gegout, their absence undermines the ICC's ability to claim international validity for its operations. In order for the Court to be considered to be a legitimate institution with a global remit, she argues, most states on all continents (particularly the five permanent members of the UNSC) must be party to the ICC to indicate a belief that its work is fair and useful.[153] To justify its existence and remit, Gegout continues, people in rich and poor regions, and within varying political systems, must view its work as helping to provide international peace and justice.[154] The power of the Court is also dependent on the number of states and the international profile of those states that are part of this body.[155] Because three out of five permanent members of the UNSC – the US, China and Russia – are not party to it, the legitimacy of the Court is immediately brought into question, despite each of these states progressively agreeing with the ICC's work or parts of it in the run-up to its establishment.[156]

Moving beyond these criticisms, the work of the ICC has, by commentators relevant to this thesis, including Alison Cole and Karen Engle, been identified as having some merit. The Rome Statute, for example, is seen by these scholars as being progressive,

[153] Catherine Gegout, The International Criminal Court: limits, potential and conditions for the promotion of justice and peace, *Third World Quarterly*, (2013), 34(5), 800-18, p.803.
[154] Ibid.
[155] Ibid.
[156] Ibid.

particularly regarding the issue of gender violence.[157] Owing to the work of gender justice advocates during the drafting of the Statute, the treaty is not only gender inclusive in its structures and procedures but also in its substantive law.[158] The Statute provides a detailed list of gender crimes in both the war crimes and crimes against humanity provisions. Like ethnicity or race, gender is described as a ground on which a person or group may be persecuted. Regarding the possibility of the ICC charging and prosecuting genocidal rape, the definition of genocide outlined in Article 6 reflects that listed in the Genocide Convention.[159] Conversely, the Elements of Crimes (EoC, 2002) – a document that helps the Court to interpret substantive offenses - notes that 'serious bodily or mental harm' can 'include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.'[160] This provision allows for genocidal rape charges to be presented to the ICC.[161]

The Rome Statute also provides clarification on the employment of personnel. State parties, for example, are required to choose judges and other members of staff with experience in the area of violence committed against children or women.[162] The Rome Statute includes a non-discrimination provision, which states that '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as *gender*'.[163] The treaty further calls for the 'fair representation of female and male judges'.[164] But the practice of the ICC does not reflect the ambitions of the Statute. In

[157] Alison Cole, 'International criminal law and sexual violence: an overview', in Clare McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives*, (Oxford and New York, NY: Routledge, 2010), 47-60, notably pp.57-9.
[158] Van Schaack, 'Engendering Genocide', p.28.
[159] Ibid.
[160] ICC, Elements of Crimes, fn 3.
[161] Van Schaack, 'Engendering Genocide', p.28.
[162] UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, (amended 2010), Articles 36(8) (Judges), 42(9) (Office of the Prosecution), and 43(6) (Victims and Witnesses Unit).
[163] Ibid, Article 21(3), (emphasis added).
[164] Ibid, Article 36(8).

2008, seven out of eighteen judges were women.[165] By 2018, the number of female judges reduced to six.[166] It is nevertheless fair to conclude that these figures do still compare favourably to other international tribunals and courts, whose configuration continues to be largely dominated by men.[167]

For its sterner critics, the ICC's achievements in practice are limited to its provision of a constructive-sounding rhetoric, where that oratorical commitment remains unsubstantiated by action. Margaret deGuzman, for example, accuses the Court of demonstrating a lack of will to either prosecute offenders or uphold its judgments,[168] pointing to trial outcomes such as the *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo* (2012).[169] Despite evidence that rape had been perpetrated by Lubanga's troops, the Prosecutor brought no charges for these crimes. During the trial, which was heard by Judge Adrian Fulford (presiding, UK), Judge Elizabeth Odio Benito (Costa Rica) and Judge René Blattmann (Bolivia), accounts of rape featured strongly, particularly in the testimony of 15 key prosecution witnesses. The victims' legal representatives, mainly those representing former female children soldiers, also referenced these crimes.[170] The Ligue pour la solidarité Congolaise (LSC), an NGO located in North Kivu working with more than 1,500 survivors, argues that the

[165] Van Schaack, 'Engendering Genocide', p.28.
[166] 'The Judges of the Court', ICC: https://www.icc-cpi.int/Publications/JudgesENG.pdf, (accessed 31 March 2020).
[167] Van Schaack, 'Engendering Genocide', p.28.
[168] See for example, Jessica Hatcher-Moore, 'Is the world's highest court fit for purpose?', *The Guardian*, 5 April 2017: https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose, (accessed 31 March 2020); UNA-UK: https://www.una.org.uk/magazine/2018-1/international-criminal-court-biased-or-simply-misunderstood, (accessed 31 March 2020); Margaret M. deGuzman, 'Is the ICC Targeting Africa Inappropriately? A Moral, Legal and Sociological Assessment', in Richard H. Steinberg, *Contemporary Issues Facing the International Criminal Court*, (Leiden: Brill Nijhoff, 2016), 333-37, p.333; International Justice Monitor: https://www.ijmonitor.org/2011/08/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/, (accessed 31 March 2020).
[169] *Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, ICC, 14 March 2012; International Justice Monitor.
[170] International Justice Monitor: https://www.ijmonitor.org/2012/06/icc-convicts-thomas-lubanga-dyilo-for-war-crimes-reactions-from-drc-partners/, (accessed 31 March 2020).

absence of these charges represents 'a minimisation by the Prosecutor and the ICC of the crimes committed against women and neglects the suffering of thousands of victims of armed conflicts and of victims of gender-based violence'.[171]

The 2018 appeal decision[172] in the *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo* (2016)[173] has proved equally contentious. The Trial Chamber, which consisted of Judge Sylvia Steiner, (presiding, Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan) – an all-female panel – originally found the accused, the former Congolese vice-president, guilty of rape as a crime against humanity and as a war crime for the actions of his troops. However, the Appeals Chamber, which was comprised of two female judges, Christine Van den Wyngaert (presiding, Belgium) and Sanji Mmasenono Monageng (Botswana) sitting alongside Chile Eboe-Osuji (Nigeria), Howard Morrison (UK) and Piotr Hofmański (Poland), later acquitted Bemba of all charges (see Appendix 2).[174] The Appeals Chamber found that the accused was 'erroneously convicted… for specific criminal acts that were outside the scope of the charges as confirmed'.[175] It added that '[t]he trial chamber erred in its evaluation of Bemba's motivation and the measures that he could have taken in light of the limitations he faced in investigating and prosecuting crimes as a remote commander

[171] Ibid.
[172] *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute')*, ICC-01/05-01/08 A, ICC, 8 June 2018; *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo (Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 21 June 2016 entitled 'Decision on Sentence pursuant to Article 76 of the Statute')*, ICC-01/05-01/08 A2 A3, ICC, 8 June 2018.
[173] *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo (Judgment pursuant to Article 74 of the Statute)*, ICC-01/05-01/08, ICC, 21 March 2016.
[174] *Bemba (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute')*; *Bemba (Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 21 June 2016 entitled 'Decision on Sentence pursuant to Article 76 of the Statute')*.
[175] Press Release, 'Appeals Chamber acquits Mr Bemba from charges of war crimes and crimes against humanity', ICC, ICC-CPI-20180608-PR1390, 8 June 2018: https://www.icc-cpi.int/Pages/item.aspx?name=pr1390, (accessed 5 September 2019).

sending troops to a foreign country.'[176] Fiona McKay described this Judgment as a blow to the idea of commander or leader responsibility, because it changed the original remit of the ICC, which provided for such responsibility to be addressed as a criminal matter.[177]

The *Bemba* case has attracted much negative comment on the proceedings of the ICC and its attitude to the prosecution of rape, particularly concerning its definition of the crime and its application. Attempting to provide a consensus on what constitutes rape in international law, the ICC had created an ICTY-ICTR hybrid definition in its EoC:[178]

1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[179]
3) The conduct took place in the context of and was associated with an international armed conflict.
4) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[180]

[176] Ibid.
[177] Owen Bowcott, 'Jean-Pierre Bemba's war crimes conviction overturned', *The Guardian*, 8 June 2018: https://www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court, (accessed 2 August 2019).
[178] Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes', in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law, Volume 7,* (Netherlands: Brill, 2003), 341-407, p.350.
[179] The ICC defines consent in its Rules of Procedure, which will be addressed in the next Chapter.
[180] ICC, Elements of Crimes, 2011, ISBN No. 92-9227-232-2, Article 7 (1)(g)-1 Crime against humanity of rape; Article 8 (2)(b)(xxii)-1 War crime of rape; and Article 8 (2)(e)(vi)-1 War crime of rape.

To date, Bemba is the only individual to have been convicted and then acquitted on appeal for rape by the ICC, in a narrative that effectively critiques and ultimately rejects its own definition. It can fairly be held to amount to a measure of the ICC's current failure – or inability – to prosecute effectively perpetrators of rape as a war crime, explaining why special international criminal tribunals continue to be established to deal with specific locations and conflict-perpetrated incidents of rape. The point that it is not about the prosecution of rape but the need to change the way that the Court operates is well sustained.[181]

Post-International Criminal Court: The Special Panels of the Dili District Court, the Special Tribunal for Lebanon and the International Residual Mechanism for Criminal Tribunals

Underlining the ICC's perceived ineffectiveness to prosecute perpetrators of war crimes is the ongoing creation of ad hoc tribunals. The necessity felt by both the UNSC and the respective national governments to create the Special Panels of the Dili District Court (2002-2006, also known as the East Timor Tribunal) and the Lebanese Tribunal (2009-present) is particularly telling. In theory, the ICC could have dealt with the abuses committed during these conflicts. Likewise, the Court could have taken over the residual functions of the ICTY and the ICTR following their closure. Instead, the UNSC established International Residual Mechanism for Criminal Tribunals (IRMCT, 2010-present) to deal with these duties. Although rape was listed amongst the crimes within the parameters of these respective courts, to date, no such prosecutions have been brought.

[181] Susana SáCouto, Leila Nadya Sadat and Patricia Viseur Sellers, 'Collective criminality and sexual violence: Fixing a failed approach', *Leiden Journal of International Law*, (2020), 33(1), 207-41.

Conclusion

Since the end of the Cold War, modern international criminal law has overall taken significant strides in its development. International criminal tribunals, for example, have evolved far beyond the earlier IMT and IMTFE models, particularly regarding the prosecution of rape as a war crime. Central to this change has been the establishment and subsequent actions of the ICTY, the ICTR and the ICC. It seems plain that the gender make-up of the panels and their cultural origins has played a role in these decisions. Influenced by their judiciary as well as by the input of activists and I/NGOs, these bodies created their own definitions of rape as a war crime for their individual purposes. In turn, they reconceptualised the offence from a gendered property crime committed against the man who formally or effectively owned the woman to a gender-neutral crime committed against the victim in their own right. These specialist courts have established a precedent that has been built on by proceeding courts like the ECCC and the SCSL.

The question remains whether the gender-neutral definitions of rape introduced by these bodies have changed how conflict-perpetrated rape is understood and prosecuted in international law in ways that makes the new will to prosecute effective. To answer this question, Chapter 4 analyses the definitions of rape evolved by the ICTY, the ICTR and the ICC. This analysis will inform the remaining chapters regarding how rape is currently understood as a crime in modern international law and to what extent the terms used to categorise rape reflect or embody this framework.

Chapter 4

Modern Conceptualisations of Rape as a Crime in International Law

Introduction

The previous chapter addressed the evolution of modern international criminal law from the creation of the UN in 1945 to the present day. It examined the founding of modern specialist international criminal tribunals as well as their response to conflict-perpetrated rape. As the first organs to explore how rape as a war crime should be understood and defined in modern international law, emphasis was placed on the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017), the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) and the International Criminal Court (ICC, 2002-present), and their individual conceptualisations of the offence (Appendix 1). Moving the discussion forward, this chapter examines these different definitions of rape in further detail as well as their application by these respective specialist courts, in order determine whether rape has been successfully recast and prosecuted as a gender-neutral crime committed against an individual in their own right. Particular attention will be paid to the categorisation and prosecution of rape as a crime of torture, outrage upon human dignity and sexual violence.

Central to the effective prosecution of a crime is not only how that offence is defined in law but also how that definition is understood and applied in the courts. Though the ICTY, the ICTR and the ICC all framed rape as gender-neutral, trial records and prosecutions outcomes both suggest that traditional heteronormative understandings of rape as a crime continue to have an impact. It has already been mentioned that male-female rape, for example, is often prosecuted as rape or rape along with another type of offence, such as a violation of human dignity or torture. Male-male rape, on the other hand, is either

overlooked or prosecuted as something other than rape, for example, torture. Female-perpetrated is largely ignored. The categorisation of rape as a form of sexual violence adds a further level of confusion, because the terms 'rape' and 'sexual violence' are at times used interchangeably, with little clarification of the reasoning behind this switching. One consideration for this chapter is how these different outcomes are linked to the language used to define rape by the ICTY, the ICTR and the ICC. Another is how these definitions are applied by the specialist international tribunals, particularly where rape is prosecuted under a category of international law. Attention will be paid to the background and gender of the judges, given their responsibilities in shaping the definitions created by these respective bodies, and their application.

(a) The International Criminal Tribunal for Rwanda

As discussed in the previous chapter, the ICTR provided the first definition of rape in international law in the *Prosecutor v. Jean-Paul Akayesu* (1998).[1] In developing its definition of rape, the Trial Chamber[2] referred to domestic definitions for guidance. It established that in certain national jurisdictions, rape was defined as non-consensual sexual intercourse.[3] In the context of the Rwandan genocide, the Trial Chamber stated its belief

[1] Heard by Judge Laïty Kama (Senegal, presiding), Judge Lennart Aspegren (Sweden) and Judge Navanethem Pillay (South Africa). *Prosecutor v. Jean-Paul Akayesu (Trial Judgment)*, ICTR-96-4-T, ICTR, 2 September 1998. Akayesu was originally charged with committing crimes of genocide, crimes against humanity and war crimes. Initially, gender-related crimes were not included in the indictment. The charges were only amended to include acts of sexual violence after witnesses testified that rape had been committed during the genocide. In 1998, Akayesu was found guilty of rape, amongst other crimes, and sentenced to life imprisonment. The conviction was upheld on appeal. *Prosecutor v. Jean-Paul Akayesu (Appeal Judgment)*, ICTR-96-4-A, ICTR, 1 June 2001, heard by Judge Claude Jorda (French, presiding), Judge Lal Chand Vohrah (Malaya), Judge Mohamed Shahabuddeen (Guyana), Judge Rafael Nieto-Navia (Columbia) and Judge Fausto Pocar (Italy).

[2] The term 'Trial Chamber' is used when the reference is being made to the legal personnel assigned to one of a Tribunal's divisions, and includes the legal support team advising on the development of legal protocols as well as to the judges. The term Tribunal is used when the reference is to the entire body as set up by statute, i.e.: the ICTY or the ICTR.

[3] For more on the preparatory and in-trial work of the Trial Chambers for ICTR, and ICTY, see Richard Ashby Wilson, *Writing History in International Criminal Trials*, (Cambridge: Cambridge University Press, 2011).

that this definition was insufficient.[4] It concluded that the central elements of the offence could not be 'captured in a mechanical description of objects and body parts'.[5] Instead, the so-called 'conceptual' approach adopted in the UN *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984*,[6] where the harm caused by an act is focused on rather than the specific acts, body parts and objects used in to commit such crimes, was favoured (see Appendix 1).[7]

The ICTR *Akayesu* definition distinguished between on the one hand rape as a crime of genocide, crime against humanity or war crime and on the other hand domestic rape.[8] The Trial Chamber determined that non-consent is immaterial in international criminal law given the oppressive and violent context in which rape is committed as an instrument of genocide, a crime against humanity and a war crime.[9] It focused instead on the issue of coercion:[10]

> [C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain

[4] Hilmi M. Zawati, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity', *Torture*, (2007), 17(1), 27-47, p.31.
[5] *Akayesu (Trial Judgment)*, paras 597; 687.
[6] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UN, Treaty Series, vol.1465, p.85. This instrument broadly encapsulates 'acts by which severe pain or suffering, whether physical or mental, is intentionally is intentionally inflicted on a person' and including occasions where that 'pain or suffering is inflicted by or at the instigation of or with the consent and acquiescence of a public official or other person acting in an official capacity'.
[7] The term 'conceptual' is used in the *Akayesu (Trial Judgment)*, paras 597; 687. It was also referred to in the *Furundžija (Trial Judgment)*, para 176.
[8] Valerie Oosterveld, 'The Influence of Domestic Legal Traditions on the Gender Jurisprudence of International Criminal Tribunals', *Cambridge Journal of International and Comparative Law*, (2013), 2(4), 825-49, p.828.
[9] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Antwerpen and Oxford: Intersentia, 2005), p.170; Catharine A. MacKinnon, 'Defining Rape Internationally', *Columbia Journal of Transnational Law*, (2006), 44(3), 940-58, p.950; Catharine A. MacKinnon, 'The Recognition of Rape as an Act of Genocide – Prosecutor v. Akayesu', Guest Lecture Series of the Office of the Prosecutor, The Hague, 27 October 2008, *New England Journal of International and Comparative Law*, (2008), 14(2), 101-10, p.102.
[10] Phillip Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law', *Boston College Law Review*, (2013), 54(3), 1207-37, p.1210.

> circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.[11]

The term 'invasion' was employed to broaden the definition of rape beyond 'sexual acts involving penetration' making it inclusive and flexible.[12] Such wording is also usefully symbolic of the different types of activities associated with war and conquest, including the invasion of territory. Using the language of 'victim', 'person' and 'perpetrator' also ensured that rape was clearly framed as gender-neutral.[13]

Since its inception, the *Akayesu* definition of rape has attracted much comment from various experts, including Richard Ashby. Focusing on the construction of the definition, he points to a deficiency in the Tribunal's methodological approach.[14] When creating the definition, for example, the Trial Chamber did not address the conflicting national standards. Nor did it provide examples of national jurisdictions that had changed the definition of rape in their penal codes. An analysis by the ICTR of how national jurisdictions had revised the definition of rape and what implications this development had for war crimes prosecutions is notably missing from its deliberations.[15] The ways in which interpretations have evolved and how they have been understood and applied in domestic case law, Anne-Marie De Brouwer explains, is also absent. Although the ICTR claimed to have taken account of national legal developments to broaden the definition of rape they named no examples.[16] Chile Eboe-Osuji, a judge of the ICC, suggests that in making this claim, the court was referring to the concept of sexual autonomy, where any act that might

[11] *Akayesu (Trial Judgment)*, para 688.
[12] De Brouwer, *Supranational Criminal Prosecution*, p.131.
[13] Ibid, p.133.
[14] Richard Ashby Wilson, *Writing History in International Criminal Trials*, (Cambridge: Cambridge University Press, 2011).
[15] *Akayesu (Trial Judgment)*, paras 596; 686. Wilson points out that the ICTR notably failed so to do in a number of areas, including definitions of genocide, and that its grasp of both Rwandan and wider African history was 'misplaced'. Wilson, *Writing History in International Criminal Trials*, pp.24; 39; 170-2.
[16] De Brouwer, *Supranational Criminal Prosecution*, pp.112-3.

satisfy a perpetrator's sexual needs, and have a traumatic and humiliating impact on the victim, in defining what constitutes rape.[17] Certainly sexual autonomy of the individual has become the focus of rape in some, but not all national jurisdictions.[18] The ICTR adopted a broad definition of rape presumably to integrate this new conceptualisation of the crime and to allow the possibility of including other types of sexual violence as the normative standard for defining rape.[19] For Mia Swart, the *Akayesu* definition 'appreciates that physical force is not always required: coercion may be inherent in certain circumstances such as armed conflict in which the victim finds him or herself.'[20]

The ICTY also examined the *Akayesu* definition. Though the former Yugoslavian Tribunal initially accepted the definition as providing an accurate conceptualisation of rape,[21] the Trial Chamber in the *Prosecutor v. Anto Furundžija* (1998)[22] (to be discussed later in the chapter) determined that the ICTR's summarisation was insufficiently specific and so violated the legality principle for the purposes of undertaking rape prosecutions.[23] While the Trial Chamber in *Akayesu* to some extent addressed the *actus reus* of the crime,[24] it did not by definition address the *mens rea* of the crime[25] – what the ICTY identified as

[17] The Trial Chamber in *Kunarac* stated that 'they understood the "sexual autonomy" of the victim as the "true" objective of the law against rape'. See Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, p.147.
[18] De Brouwer, *Supranational Criminal Prosecution*, p.110.
[19] Ibid.
[20] Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda*, p.228.
[21] The *Akayesu* definition was initially upheld by the ICTY in the *Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić (Trial Judgment)*, IT-96-21-T, ICTY, 16 November 1998, paras 478-9.
[22] *Prosecutor v. Anto Furundžija (Trial Judgment)*, IT-95-17/1-T, ICTY, 10 December 1998. The Trial Chamber reiterated this point in the *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (2001), explaining that such an understanding made it too exhaustive. *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001, paras 174-86.
[23] Ibid, para 177; Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals*, (New York, NY: Oxford University Press, 2014), p.43.
[24] 'While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.' *Akayesu (Trial Judgment)*, para 596
[25] Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law', p.1210.

'the state of mind statutorily required in order to convict a particular defendant of a particular crime.'[26] Instead, ICTR had simply stated as a basis for prosecution that '[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.'[27] For the ICTY, this qualification failed to explicitly address the intention or knowledge of the perpetrator in terms of what it saw as key issues, such as force, threat of force and coercion. Attempting to provide what it considered a clear legally robust definition of the rape, the ICTY created the *Furundžija* definition – a so-called 'mechanical' definition,[28] which describes the specific acts, body parts and objects used in rape (see Appendix 1).[29]

The *Furundžija* definition was unsurprisingly rejected by the ICTR in the *Prosecutor v. Alfred Musema* (2000).[30] The Trial Chamber stated that the *Akayesu* definition was preferable because it encompasses all conduct addressed in the ICTY *Furundžija* definition of rape but also allows for more violations to be included.[31] It suggested that there was a growing trend in national jurisdictions to expand the definition of rape.[32] The Trial Chamber concluded that the *Akayesu* definition was most appropriate

[26] Legal Information Institute, Cornell Law School: https://www.law.cornell.edu/wex/mens_rea, (accessed 24 August 2019).
[27] *Akayesu (Trial Judgment)*, para 597.
[28] ICTY employed this term to distinguish between its definition and the ICTR *Akayesu* definition. *Furundžija (Trial Judgment)*, para 176.
[29] The *Furundžija* definition will be discussed in detail later in this Chapter.
[30] *Prosecutor v. Alfred Musema (Judgment and Sentence)*, ICTR-96-13-T, ICTR, 27 January 2000 was heard by The Trial Chamber, which consisted of Judge Aspegren (presiding), Judge Kama and Judge Pillay (the same panel that heard the *Akayesu* trial). Musema was initially found guilty of rape as a crime against humanity (Count 7), among other crimes, and given a single sentence of life imprisonment, although he was found not guilty of the charge on appeal. *Prosecutor v. Alfred Musema (Appeal Judgment)*, ICTR-96-13-A, ICTR, 16 November 2001, p.137. Heard by a male only panel: Judge Claude Jorda (French, presiding), Judge Lal Chand Vohrah (Malaya), Judge Mohamed Shahabuddeen (Guyana), Judge Rafael Nieto-Navia (Columbia) and Judge Fausto Pocar (Italy). See Appendix 2.
[31] *Musema (Judgment and Sentence)*, para 226.
[32] Ibid, para 228.

because it better accommodates the 'evolving norms of criminal justice.'[33] However, no clarification was provided for what the ICTR understood as 'evolving norms'.[34]

Following the *Musema* Judgment, however, the ICTR seemingly struggled to accept the *Akayesu* definition for rape. In 2003, in the *Prosecutor v. Laurent Semanza*,[35] the Trial Chamber stated that while the 'mechanical style of defining rape was originally rejected by this Tribunal,'[36] it found the comparative analysis in the ICTY *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (2001)[37] to be persuasive.[38] The Trial Chamber therefore adopted the *Kunarac* definition of rape (to be discussed later in the chapter),[39] which removed the element of coercion, force and threat of force listed in the ICTY *Furundžija* definition and included instead the element of consent (see Appendix 1).

One day after the *Semanza* Judgment, the Trial Chamber altered its position in the *Prosecutor v. Eliézer Niyitegeka* (2003)[40] and used the *Akayesu* definition, without clarifying the reasons for this choice.[41] Later that year, the Trial Chamber again changed

[33] Ibid.
[34] Ibid.
[35] The Trial Chamber included Judge Yakov Ostrovsky (presiding, Russia), Judge Lloyd G. Williams QC (Jamaica) and Judge Pavel Dolenc (Slovenia) – an all-male and predominantly white panel. The accused was found guilty for instigating rape as a crime against humanity (Count 10) and instigating torture by rape (Count 11) and sentenced to seven and ten years' imprisonment respectively (see Appendix 2). Sentences served consecutively to the other concurrent sentences. *Prosecutor v. Laurent Semanza (Judgment and Sentence)*, ICTR-97-20-T, ICTR, 15 May 2003, para 588. Semanza's conviction for rape as a crime against humanity was upheld on appeal. *Prosecutor v. Laurent Semanza (Appeal Judgment)*, ICTR-97-20-A, ICTR, 20 May 2005. Heard by Judge Theodor Meron (presiding, US), Judge Mohamed Shahabuddeen (Guyana), Judge Mehmet Güney (Turkey), Judge Fausto Pocar (Italy), and Judge Inés Mónica Weinberg de Roca (Argentina) (the only female on the bench). See Appendix 2.
[36] *Semanza (Judgment and Sentence)*, para 345.
[37] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001.
[38] *Semanza (Judgment and Sentence)*, para 345.
[39] Ibid.
[40] The case was presided over by Navanethem Pillay alongside Erik Marse and Andrksia Vaz. *Prosecutor v. Eliézer Niyitegeka (Judgement and Sentence)*, ICTR-96-14-T, ICTR, 16 May 2003.
[41] Ibid, para 456. The accused was found Guilty Of Crimes Against Humanity Other Inhumane Acts (Count 8) (which included acts of 'sexual violence', see paras 467; 480) and Not Guilty Of Rape As A Crime Against Humanity (Count 7); Not Guilty of Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9); Not Guilty of Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10), para 480. See Appendix 2.

its stance in the *Prosecutor v. Juvénal Kajelijeli*.[42] It found that '[g]iven the evolution of the law in this area, culminating in the endorsement of the *Furundžija/Kunarac* approach by the ICTY Appeals Chamber,' it supported the application of the *Kunarac* definition.[43] This standpoint was later echoed in the *Prosecutor v. Jean de Dieu Kamuhanda* (2004).[44] It has already been noted previously in the thesis that the profile of the different sitting judges influenced both definitions and trial outcomes, something which will be revisited later in this chapter in more detail.

In 2005, for example, the ICTR revisited its choice in the *Prosecutor v. Mikaeli Muhimana*.[45] The Trial Chamber determined:

> [T]he *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a 'physical invasion of a sexual nature', *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature

The ICTR later clarified that Counts 9 and 10 related to rape charges in the Office of the Prosecutor of the International Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, (Arusha: ICTR, 2014), Appendix B.

[42] Heard by Judge William H. Sekule (presiding, Tanzania), Judge Winston C. Matanzima Maqutu (Lesboth) and Judge Arlette Ramaroson (Madagascar), the only female panellist. *Prosecutor v. Juvénal Kajelijeli (Judgment and Sentence)*, ICTR-98-44A-T, ICTR, 1 December 2003. Kajelijeli was found not guilty of rape as a crime against humanity (Count 7). See Appendix 2.

[43] Ibid, para 915.

[44] Again heard by Sekule (presiding), Maqutu and Ramaroson. *Prosecutor v. Jean de Dieu Kamuhanda (Judgment and Sentence)*, ICTR-99-54A-T, ICTR, 22 January 2004, para 709. The accused was found Not Guilty Of Rape As A Crime Against Humanity (Count 6) and Outrage On Personal Dignity as Serious Violations Of Article 3 Common To The Geneva Conventions And Of Additional Protocol II (Count 8) among other crimes. See Appendix 2.

[45] Presided by Judge Khalida Rashid Khan (Pakistan), the only female on the panel, alongside Judge Lee Gacuiga Muthoga (Kenya) and Judge Emile Francis Short (Ghana), *Prosecutor v. Mikaeli Muhimana (Trial Judgment)*, ICTR-95-1 B-T 550-1, ICTR, 28 April 2005. The accused was found Guilty Of Rape As A Crime Against Humanity (Count 3) and sentenced to life imprisonment. *Prosecutor v. Mikaeli Muhimana (Appeal Judgement)*, ICTR-95-1B-A, ICTR, 21 May 2007. The Appeal Chamber reversed the Trial Chamber's finding that he bears criminal responsibility for the rapes of Goretti Mukashyaka and Languida Kamukina; affirmed unanimously his conviction for rape as a crime against humanity (Count 3) in all other respects; and affirmed unanimously his sentence of imprisonment for the remainder of his life entered for that conviction. Heard by an all-male panel, consisting of Judge Fausto Pocar (Italy, presiding), Judge Mohamed Shahabuddeen (Guyana), Judge Mehmet Güney (Turkey), Judge Liu Daqun (China) and Judge Wolfgang Schomburg (Germany).

> amounting to rape. On the basis of the foregoing analysis, the Chamber endorses the conceptual definition of rape established in *Akayesu*, which encompasses the elements set out in *Kunarac*.[46]

Though the *Akayesu* definition was applied in this case it is not because the Trial Chamber condemned the *Kunarac* definition. Rather, it determined that the respective definitions were complimentary. The Trial Chamber simply preferred the *Akayesu* definition in this instance.

Once more, in 2006, the Trial Chamber reconsidered the *Akayesu* definition in the *Prosecutor v. Tharcisse Muvunyi*,[47] and determined that the *Kunarac* definition was to be applied in this case.[48] The *Kunarac* definition was subsequently applied in the *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva* (2008),[49] *Prosecutor v. Tharcisse Renzaho* (2009),[50] and *Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, and Innocent*

---

[46] *Muhimana (Trial Judgment)*, paras 550-1.
[47] *Prosecutor v. Tharcisse Muvunyi (Judgment and Sentence)*, ICTR-00-55A-T, ICTR, 12 September 2006.
[48] Ibid, para 522. Not Guilty of Rape as a Crime Against Humanity (Count 4). Heard by Judge Asoka de Silva (Sri Lanka, presiding), alongside two female judges - Flavia Lattanzi (Italian) and Florence Rita Arrey (Cameroon).
[49] *Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva (Judgment and Sentence)*, ICTR-98-41-T, ICTR, 18 December 2008. Bagosora was found Guilty Of Rape as a Crime Against Humanity (Count 7) among other crimes. He was given a single sentence of life imprisonment. Kabiligi found Not Guilty Of Rape As A Crime Against Humanity (Count 6); Ntabakuze found Not Guilty Of Rape As A Crimes Against Humanity (Count 6); Nsengiyumva found Not Guilty Of Rape As A Crimes Against Humanity (Count 7), para 2199. Heard by an all-male panel, Judge Erik Møse (Norway, presiding), Judge Jai Ram Reddy (Fiji) and Judge Sergei Alekseevich Egorov (Russian Federation). Bagosora's conviction for rape was affirmed on appeal - *Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva (Appeal Judgment)*, ICTR-98-41-A, ICTR, 14 December 2011. Heard again by an all-male panel, Judge Theodor Meron (US, presiding), Judge Patrick Robinson (Jamaica), Judge Mehmet Güney (Turkey), Judge Fausto Pocar (Italy) and Judge Liu Daqun (China).
[50] *Prosecutor v. Tharcisse Renzaho (Judgment and Sentence)*, ICTR-97-31-T, ICTR, 14 July 2009, para 791-2. 812; 826. Guilty of Rape as a Crime Against Humanity (Count 4); Guilty of Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (Rape) (Count 6). Given a single sentence life imprisonment. Heard by Heard by Judge Erik Møse (Norway, presiding), Judge Sergei Alekseevich Egorov (Russian Federation) and Judge Florence Rita Arrey (Cameroon), the only female sitting on the panel. For the appeal judgment, see *Prosecutor v. Tharcisse Renzaho (Appeal Judgment)*, ICTR-97-31-A, ICTR, 1 April 2011. Heard by an all-male panel, Judge Carmel Agius (Malta, presiding), Judge Güney (Turkey), Judge Pocar (Italy) and Judge Liu Daqun (China), Judge Theodor Meron (US).

Sagahutu (2011).[51] In the ground-breaking *Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje* (2011),[52] where the ICTR for the first time found a woman guilty of rape for using her political position to commission acts of rape, the *Kunarac* definition was also applied without clarification.[53] This definition was later used in 2012, in the *Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse*[54] and the *Prosecutor v. Augustin Ngirabatware*.[55]

[51] *Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, and Innocent Sagahutu (Judgment and Sentence)*, ICTR-00-56-T, ICTR, 17 May 2011, para 2121; 2162; 2265 Augustin Bizimungu Guilty of Rape as a Crime Against Humanity (Count 6); Guilty of Rape as a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 8), and sentenced to 30 years imprisonment. François-Xavier Nzuwonemeye Not Guilty of Rape as a Crime Against Humanity (Count 6): Not Guilty of Rape as a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 8). Innocent Sagahutu Not Guilty of Rape as a Crime Against Humanity (Count 6); Not Guilty of Rape as a Violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 8). Heard by Judge Asoka de Silva (Sri Lanka, presiding), Judge Seon Ki Park (South Korea) and Judge Taghrid Hikmet (Jordan), the only female on the panel. For Appeal Judgment, see *Prosecutor v. Augustin Bizimungu (Appeal Judgment)*, ICTR-00-56B-A, ICTR, 30 June 2014. Heard by Judge Theodor Meron (US, presiding), Judge Liu Daqun (China), Judge Carmel Agius (Malta), Judge Bakhtiyar Tuzmukhamedov (Russia), and Judge Khalida Rashid Khan (Pakistan), the only female on the panel.

[52] Heard by Judge Sekule (presiding, Tanzania), alongside two female judges, Ramaroson (Madagascar) and Solomy Balungi Bossa (Uganda). *Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje, (Judgment and Sentence)*, ICTR-98-42-T, 24 June 2011, paras 6177-86; 6271. The ICTR charged Nyiramasuhuko, former Minster of Family and Women's Development for Rwanda, for using her political position to commission acts of rape as a violation of human dignity. Nyiramasuhuko was the first woman charged and prosecuted for rape as a crime against humanity (Count 7) and as Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II Thereto (Outrages upon Personal Dignity) (Count 11). She was later found guilty and given a single sentence of life imprisonment. For his role, Nyiramasuhuko's son, Ntahobali, was also charged with rape as a crime against humanity (Count 7) and as Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II Thereto (Outrages upon Personal Dignity) (Count 11), and given a single sentence of life imprisonment. See also Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, Future*, (Lieden: Martinus Nijhoff Publishers, 2011), p.100.

[53] *Nyiramasuhuko et al. (Judgment and Sentence)*, para 6075.

[54] *Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse (Judgment and Sentence)*, ICTR-98-44-T, ICTR, 2 February 2012, para 1676. Karemera Guilty of Rape as a Crime Against Humanity (Count 5) – single sentence of life imprisonment; Ngirumpatse Guilty of Rape as a Crime Against Humanity (Count 5) – single sentence of life imprisonment, paras 1714-5. Heard by Judge Dennis C.M. Byron (St Kitts and Nevis, presiding), Judge Gberdao Gustave Kam (Burkina Faso) and Judge Vagn Joensen (Denmark). For Appeal Judgment see, *Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse (Appeal Judgment)*, ICTR-98-44-A, ICTR, 29 September 2014. Heard by Judge Theodor Meron (US, presiding), Judge Fausto Pocar (Italy), Judge Bakhtiyar Tuzmukhamedov (Russia), Judge Koffi Kumelio A. Afande (Togo) and Judge Arlette Ramaroson (Madagascar), the only female on the panel.

[55] *Prosecutor v. Augustin Ngirabatware (Judgment and Sentence)*, ICTR-99-54, ICTR, 20 December 2012, para 1381. Guilty of Rape as a Crime Against Humanity (Count 6) single sentence of 35 years' imprisonment, paras 1394; 1420. Heard by Judge William H. Sekule, (Tanzania, presiding), Judge

Notwithstanding these inconsistencies, the ICTR did establish a firm position regarding the categorisation of rape notably in that the Tribunal found that rape is a form of sexual violence. Clarifying what it considers to be 'sexual violence' in the absence of a statutory definition in international law, the *Akayesu* Trial Chamber described the offence as, 'as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.'[56] The Tribunal also established that rape may constitute torture[57] as well as an outrage upon human dignity.[58]

Despite these findings, ICTR rarely and inconsistently prosecuted rape on such grounds. For example, of the cases discussed above, only one individual was prosecuted and convicted by the ICTR for rape and rape as an act of torture.[59] Though rape was occasionally charged and prosecuted as constituting an outrage upon human dignity, the success rate was not encouraging. Convictions were few.[60] It is difficult to discern with

Mparany Rajohnson (Madagascar) and Judge Solomy Balungi Bossa (Uganda), the only female on the panel.

[56] *Akayesu (Trial Judgment)*, para 688; *Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić and Zoran Žigić (Trial Judgment)*, IT-98-30/1-T, ICTY, 2 November 2001, para 180. See also Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation', Office of the UN High Commissioner for Human Rights, (2012), 1-41: https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf, (accessed 27 August 2019), p.5; fn 5. In contrast, the ICC did not refer to any specific acts in its definition of sexual violence. Instead, it simply referenced acts of a sexual nature. See ICC, Elements of Crimes, 2011, Article 7 (1) (g)-6, Article 8 (2) (b) (xxii)-6, Article 8 (2) (e) (vi)-6.

[57] *Semanza (Trial Judgement)*, para 485, (upheld on appeal).

[58] Office of the Prosecutor of the International Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions*, Appendix B.

[59] Ibid; *Semanza (Judgment and Sentence)*, para 481-5; 553.

[60] For example, though Niyitegeka was found guilty of Guilty of crimes against humanity other inhumane acts, including 'sexual violence'(Count 8), he was found not guilty of (among other crimes) rape as a violation of common Article 3, outrages upon personal dignity (Count 10); Kamuhanda, was found not guilty of Rape, outrage upon personal dignity as a serious violation of common Article 3 (Count 8) as well as Rape as a crime against humanity (Count 6), para 745; *Nyiramasuhuko et al., (Judgment and Sentence)*, Nyiramasuhuko was found guilty of rape as a crime against humanity (Count 7) and as Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II Thereto (Outrages upon Personal Dignity, rape and indecent assault) (Count 11). Ntahobali, was also charged with rape as a crime against humanity (Count 7) and as Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II Thereto (Outrages upon Personal Dignity, rape and indecent assault) (Count 11), paras 6177-86; 6271. See also Alona Hagay-Frey, *Sex and Gender Crimes in the New International*

certainty the rationale behind the Tribunal's decision to prosecute so few cases of rape as a form of torture or as an outrage of personal dignity. The use of the term 'sexual violence' to describe instances of rape adds another layer of confusion as the terms are used, at times, interchangeably, which leads one to question the significance of this categorisation. In *Niyitegeka*, for example, an act of rape committed on the body of a deceased woman was described as sexual violence in the Judgment, not rape.[61] The wider significance of describing rape as a form of sexual violence in *Niyitegeka* remains unclear currently. In *Renzaho*, rape was subsumed under the heading of sexual violence.[62] In other cases, rape was distinguished from other forms of sexual violence.[63]

In contrast, no incidents of male-male rape were prosecuted by the Tribunal, despite the prevalence of such acts during the Rwandan Genocide.[64] This absence could be linked to local attitudes towards same sex intercourse and the Tribunal's sensitivity towards such viewpoints. Though homosexuality is not criminalised in Rwanda, it remains a taboo.[65] Suspected members of the LGBTQI community are often arrested under public order and moral clauses in the Penal Code.[66] As a result, 'gay men do not dare publicly reveal their sexual orientation because of the stigma associated with homosexuality'.[67] Indeed, while female rape victims are often stigmatised, it is more likely that their case

Law: Past, Present, Future, (Lieden: Martinus Nijhoff Publishers, 2011), p.100. The Office of the Prosecutor of the ICTR clarified the charges and prosecution results in each of these cases in the *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions*.

[61] *Niyitegeka (Trial Judgment)*, paras 287; 477.

[62] *Renzaho (Trial Judgment)*, section (xiv); paras 25-6.

[63] In *Niyitegeka* the crimes identified as rape and sexual violence by the Tribunal were separated. See *Niyitegeka (Trial Judgment)*.

[64] Richard J. Goldstone, 'Prosecuting Rape as a War Crime,' *Case Western Reserve Journal of International Law*, (2002), 34(3), 277-86, p.277.

[65] Brian Crawford, *Rwanda - Culture Smart!: The Essential Guide to Customs & Culture*, (London: Kuperard, 2019), p.56.

[66] Ibid.

[67] Canada: Immigration and Refugee Board of Canada, *Rwanda: Situation of sexual minorities and treatment of this group by society and the authorities; legislation, state protection and support services (2011-August 2013)*, 9 September 2013, RWA104584.FE.

will be investigated than one involving a gay man.[68] These attitudes towards homosexual men might explain the ICTR's lack of will to not only explore allegations of male-male rape, but for such victims to come forward.

Another possible explanation could be linked to the judiciary. Indeed, a number of the ICTR judges come from states where homosexuality is illegal, including Senegal, Jamaica, Tanzania, Pakistan, Kenya, Ghana, and Uganda.[69] Other judges come from countries where homosexuality is, like in Rwanda, held as a taboo.[70] In light of the conclusions drawn in the previous chapter, it is quite reasonable to assume that their background may have influenced their decision to overlook such incidents.

On balance, while the ICTR made significant gains in the prosecution of rape as a crime in international law, there are visible inconsistencies in its prosecution strategies and outcomes, particularly with respect to its apparent reluctance to prosecute rape as a form of torture or outrage upon human dignity.

(b) The International Criminal Tribunal for the former Yugoslavia

Turning to the ICTY, in 1998, following the ICTR's creation of the *Akayesu* definition of rape, the ICTY introduced the *Furundžija* definition (Appendix 1).[71] The Tribunal concluded that in order to create a definition of rape that would be accurate and legally robust in international law, certain principles of criminal law common to 'the major legal systems of the world' needed to be examined.[72] The Trial Chamber established that of the

[68] For a broad discussion of homosexuality and male-male rape, see Michael Scarce, *Male on Male Rape: The Hidden Toll of Stigma and Shame*, (New York, NY: Perseus Books, 1997); Sandesh Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', *Human Rights Quarterly*, (2005), 27(4), 1274-306.
[69] Human Dignity Trust: https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/, (accessed 17 August 2020).
[70] Russia, for example.
[71] *Furundžija (Trial Judgment)*, para 185.
[72] Ibid, para 178.

penal codes surveyed, the majority of national jurisdictions consider rape to be 'the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus'.[73]

In developing the definition, the Trial Chamber surveyed eighteen different penal codes of rape, including Zambia, Italy, and England and Wales – the respective nation states of those judges hearing the case: Judge Florence Ndepele Mwachande Mumba (presiding), the only female sitting on the panel, alongside Judge Richard May and Judge Antonio Cassese. No explanation is given for why the codes of these particular states were chosen by the ICTY as opposed to others. Whether those codes were analysed in terms of national case law application remains unclear.[74] Though the Trial Chamber in *Furundžija* addressed the *actus rea* of rape,[75] the *mens rea* was only identified in terms of clarifying the charges of aiding and abetting rape, not rape in general.[76]

The *Furundžija* definition has also been criticised for including the elements of force, threat of force and coercion.[77] The Trial Chamber stated that all jurisdictions surveyed 'require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless.'[78] This framework was considered too vague by its critics, because it leaves unclear what the ICTY considers to constitute force, threat of force or coercion.

[73] Ibid, para 181.
[74] The ICTY examined the definitions of rape found in the case law and penal codes of Argentina, Australia, Austria, Bosnia and Herzegovina, Chile, China, England and Wales, France, Germany, India, Italy, Japan, the Netherlands, Pakistan, the Socialist Federal Republic of Yugoslavia, South Africa, Uganda and Zambia; see *Furundžija (Trial Judgment)*, fns 207-14. It provides no justification or explanation for its selection. See Oosterveld, 'Influence of Domestic Legal Traditions', pp.828-30.
[75] *Furundžija (Trial Judgment)*, para 180, later expressed in the *Furundžija* definition of rape, para 185.
[76] Ibid, paras 236-49.
[77] Ibid, para 185.
[78] Ibid, para 180.

Responding to such criticisms, in *Kunarac*[79] the judges on the Bench (Judge Mumba, presiding alongside Judge Pocar, Italy and Judge Hunt, Australia) re-examined the national criminal codes previously considered in developing the *Furundžija* Judgment and a further twenty codes, this time including Australia, reflecting the role of Judge Hunt.[80] The *Kunarac* Trial Chamber did note that other factors could result in an act of sexual penetration being adjudged as a crime of rape.[81] The Trial Chamber, for example, found that in domestic law, the fundamental principle was often *not* force, threat of force or coercion. Rather, 'absence of consent or voluntary participation'[82] (a defilement of sexual autonomy)[83] was required:

> [T]he *Furundžija* definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration *non-consensual* or *non-voluntary* on the part of the victim, which… is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.[84]

[79] Kunarac, Kovač, and Vuković were charged for their roles in the commission of crimes against the Bosnian Muslim civilians between 1992 and 1993. Kunarac was sentenced to 28 years' imprisonment for crimes against humanity (torture, rape, enslavement), and war crimes (torture and rape). Kovač was sentenced to 20 years' imprisonment for war crimes of rape and outrages upon personal dignity, and crimes against humanity of enslavement and rape. Vuković was found guilty of torture and rape as war crimes and crimes against humanity and sentenced to twelve years' imprisonment. *Kunarac (Trial Judgment)*.

[80] The additional penal codes within the following states were also examined: Bangladesh, Belgium, Brazil, Canada, Costa Rica, Denmark, Estonia, Finland, Korea (region not specified), New Zealand, Nicaragua, Norway, the Philippines, Portugal, Sierra Leone, Spain, Sweden, Switzerland, the United States and Uruguay. Ibid, paras 443-4; 447-51; 453-56. See Oosterveld, 'Influence of Domestic Legal Traditions', p.831.

[81] *Kunarac (Trial Judgment)*, paras 438; 457.

[82] Ibid, para 440.

[83] Ibid, para 457.

[84] Ibid, para 438, (original emphasis).

The Trial Chamber also reflected that non-consent is a central element of the *mens rea* of the crime: 'the intention to effect this sexual penetration, *and the knowledge that it occurs without the consent of the victim*.'[85] The Trial Chamber therefore removed the element of force, threat of force or coercion and added the element of non-consent: 'where such sexual penetration occurs without the consent of the victim'.[86] Providing further clarification, the Trial Chamber stated that consent must be 'given voluntarily as a result of the victim's free will, assessed in the context of the surrounding circumstances'.[87]

Pursuant to the ICTY Rules of Procedure and Evidence (RPE, 1994),[88] which provide detailed rules for the Tribunal, consent shall not be allowed as a defence in cases of sexual assault if the victim:

(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression;

or

(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.[89]

The inclusion of the element of consent in the ICTY *Kunarac* definition has provoked much criticism from experts such as Valerie Oosterveld, pointing out that a focus on non-consent is the core or central concern of many of domestic legislators.[90] For Kirsten Boon, consent and any issues relating to consent are invalid in war crimes prosecutions. She explains that crimes of genocide, crimes against humanity and war crimes are

[85] Ibid, para 460, (emphasis added).
[86] Ibid.
[87] Ibid.
[88] UN International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015.
[89] ICTY, RPE, Rule 96.
[90] Oosterveld, 'Influence of Domestic Legal Traditions', pp.831-2.

fundamentally coercive. In armed conflict, it is legally irrelevant to question whether an individual has consented to a transaction under coercion, because acts of force are inherent to conflict and undermine principles of human dignity.[91] It is redundant to include in a definition of rape an element that will be automatically proven once the jurisdiction for a prosecution has been agreed as being a crime of genocide or a crime against humanity.[92] The all-male panel in the *Kunarac* Appeal (2002)[93] observed that 'the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.'[94] It removes the potential for the accused to provide themselves with a possible means of defence.[95] Excluding consent, it has been noted on the other hand, may result in an 'over-inclusion of victims' and a neglect of the defendants' rights.[96]

Another challenge is that the ICTY omitted to include the age that an individual can legally consent to sexual intercourse. This lack of clarification on age of consent is a major problem for an agreed international jurisprudence, because age of consent to sex differs widely between states.[97] The *Convention on the Rights of the Child 1989*[98] previously attempted to address this issue. Under Article 1 of the Convention, 'a child

[91] Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent', *Columbia Human Rights Law Review*, (2001), 32, 625-75, pp.654-5.
[92] Ibid; Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law', *American Journal of International Law*, (2007), 101(1), 121-40, p.128.
[93] Members were Judge Claude Jorda, (presiding, France), Judge Mohamed Shahabuddeen (Guyana), Judge Wolfgang Schomburg (Germany), Judge Mehmet Güney (Turkey), and Judge Theodor Meron (US). *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, ICTY, 12 June 2002.
[94] Ibid, para 130.
[95] For issues relating to consent as a form of defence, see Dana Berliner, 'Rethinking the Reasonable Belief Defense to Rape', *Yale Law Journal*, (1991), 100(8), 2687-706, p.2689.
[96] Oosterveld, 'Influence of Domestic Legal Traditions', p.832.
[97] Even within national jurisdictions, the age of consent issue has been, historically, and remains a challenging issue. See Kim Stevenson, 'Not Just the Ideas of a Few Enthusiasts': Early Twentieth Century Legal Activism and Reformation of the Age of Sexual Consent', *Cultural and Social History*, (2017), 14(2), 219-36; Kim Stevenson, Anne Davies and Michael Gunn, *Blackstone's Guide To The Sexual Offences Act 2003*, (Oxford: Oxford University Press, 2004).
[98] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UN, Treaty Series, vol.1577, p.3.

means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.[99] This provision permits ambiguity. Whilst Article 34 stipulates that states are responsible for protecting 'the child from all forms of sexual exploitation and abuse',[100] Article 1 negates the force of this commitment. Moreover, states such as Somalia, South Sudan and the US have yet to ratify the Convention. Despite this lack of clarity and agreement regarding age of consent to sex, there is no identifiable move to establish a clear standard.[101] This absence makes it difficult to determine whether and when an individual is lawfully capable of consenting to sex. Alternatively, though this is never explicitly stated, it may well be that the ICTY Trial Chamber took note of the local legal age of consent but, to avoid further controversy, chose not to acknowledge this dimension.

The ICTY has also been criticised for adopting the term 'penetration'[102] rather than 'invasion', even though the term 'invasion' has only been thus far used to broaden the definition of rape beyond 'sexual acts involving penetration'.[103] The Tribunal aimed to provide a gender-neutral definition of rape.[104] It therefore excluded reference to specific genders performing specific acts. Conversely, it aimed to incorporate language which closely reflects the terminology used in national definitions.[105] The *Furundžija* Trial Chamber found that, '[t]he laws of several jurisdictions state that the *actus reus* of rape

[99] Ibid, Article 1.
[100] Ibid, Article 34.
[101] See the comment on the inadequacy of war crimes charges including the issue of age of consent in the Democratic Republic of the Congo (DRC), Sonja Grover, *Humanity's Children. ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children*, (Berlin: Springer, 2012), pp.123-30.
[102] *Furundžija (Trial Judgment)*, para 185; *Kunarac (Trial Judgment)*, para 460.
[103] For a discussion on penetration, see De Brouwer, *Supranational Criminal Prosecution*, pp.115; 131. The *Akayesu* definition used the term 'invasion' instead of penetration. *Akayesu (Trial Judgment)*, paras 598; 688.
[104] Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?*, (Ebook: Örebro University Studies in Law, 2010), p.447; Valerie Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals', *Journal of International Law and International Relations*, (2014), (10), 107-28, p.111.
[105] *Furundžija (Trial Judgment)*, para 178.

consists of the *penetration*, however slight, of the *female sexual organ by the male sexual organ*',[106] which was later upheld in the *Kunarac* case.[107] Nancy Farwell argues that the term 'penetration' reintroduces the traditional idea of rape as a crime of honour in international law.[108] As Gay McDougall observes, 'the historic focus on the act of penetration largely derives from a male preoccupation with assuring women's chastity and ascertaining paternity of children'.[109] This understanding lessens the seriousness of the offence.[110]

Returning to the issue of penetration, the ICTY Trial Chamber in *Furundžija* stated that 'the *forced penetration of the mouth by the male sexual organ* constitutes a most humiliating and degrading attack upon human dignity.'[111] It determined that as an 'extremely serious sexual outrage', 'forced oral penetration should be classified as rape'.[112] Some experts criticise the Tribunal for failing to address other types of sexual penetration, including penetration of a vagina with a tongue or finger. Anne-Marie de Brouwer points out that several national jurisdictions include other types of forced oral sex in their

[106] Ibid, para 180, (emphasis added). The Trial Chamber referenced the following codes: Section 375 of the Pakistani Penal Code 1995; Article 375 of the Indian Penal Code; The Law of South Africa, W.A. Joubert (1996), p.257-8: 'The *actus reus* of the crime consists in the penetration of the female by the male's sexual organ (*R. v. M.* 1961 2 SA 60 (O) 63). The slightest penetration is sufficient.' (*R. v. Curtis* 1926 CPD 385 389); Section 117 of the Ugandan Penal Code: '[t]here must be "carnal knowledge." This means sexual intercourse. Sexual intercourse in turn means penetration of the man's penis into the woman's vagina', ibid, fn 209.

[107] See *Kunarac* definition. *Kunarac (Trial Judgment)*, para 460.

[108] Experts note that under the traditional model, rape is an act which damages the honour of not only of the woman who has been assaulted, but the man who owns her. See Nancy Farwell, 'War Rape: New Conceptualizations and Responses', *Affilia*, (2004), 19(4), 389-403, pp.394-5; Catherine N. Niarchos, 'Women, War, and Rape: Challenges Facing The International Criminal Tribunal for the Former Yugoslavia', *Human Rights Quarterly*, (1995), 17(4), 649-90, pp.672-6; Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, (London and The Hague: Kluwer Law International, 2001), pp.107-10; Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases', in Baron Serge Brammertz and Michelle Jarvis, (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford: Oxford University Press, 2016), 33-72, p.35; Rhonda Copelon, 'Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law', *Hastings Women's Law Journal*, (1994), 5(2), 243-66, p.249.

[109] UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic rape, sexual slavery and slavery-like practices during armed conflict: final report / submitted by Gay J. McDougall, Special Rapporteur*, 22 June 1998, E/CN.4/Sub.2/1998/13, para 24.

[110] Copelon, 'Surfacing Gender', p.249.

[111] *Furundžija (Trial Judgment)*, para 183, (emphasis added).

[112] Ibid.

definitions of rape.[113] Taking this observation further, the *Furundžija* Trial Chamber discerned that at national level, there is a trend to include other types of sexual offences, provided 'they meet certain requirements, chiefly that of *forced physical penetration*.'[114] Yet both of the ICTY definitions preclude forced oral penetration with an object or body part, other than the penis,[115] despite evidence of such acts taking place during the conflict.[116] Again, this lack works to reinforce the male-perpetrator-female-victim stereotype.

Others argue that too much emphasis on penetrative acts reinforces the idea that other acts involving sexual violence, but not penetration, are inherently less harmful.[117] It makes it more difficult for rape victims to construct their case. For example, they may be required to discuss the crime in anatomical terms. Often either such language usage will not be within victim's terminological knowledge or if the victim is equipped with this knowledge, they cannot display it in a 'respectable' way.[118] Employment of the term 'invasion' might work to explain what had happened to the victim in a way that satisfies the courts and be less damaging victims by emphasising the link to conflict.[119] Yet it could also signal a departure from language that is traditionally associated heteronormative incidents of rape.

---

[113] De Brouwer, *Supranational Criminal Prosecution*, p.115.
[114] *Furundžija (Trial Judgment)*, para 179, (emphasis added).
[115] The *Furundžija* definition refers only to penetration 'of the mouth of the victim by the penis of the perpetrator.' Ibid, para 185. Echoed in the *Kunarac* definition, *Kunarac (Trial Judgment)*, para 460.
[116] For example, during the *Simić et al.* trial, it was established that Aleksandar Vuković, 'Vuk', grabbed the victim, Simo Zarić's, by the hair and told him to open his mouth. Vuk proceeded to force the barrel of a pistol in Zarić's mouth. *Simić et al. (Trial Judgment)*, fn 2392.
[117] De Brouwer, *Supranational Criminal Prosecution*, p.114.
[118] Ibid, p.114. See also Judith Rowbotham, '"Knowing Too Much": The Problems of Female Testimony in Rape Cases and the Challenge of Respectability', unpublished conference paper, Gender Unbound: Conference on Law, Gender and Sexuality, Keele University, 9-11 July 2007.
[119] Though purely speculative, this position is endorsed by the symbolic language used by Alketa Xafa-Mripa in her Kosovo exhibition, which highlights the plight of sexual violence victims in armed conflict. See *Thinking of Her: 5000 Skirts*, Pristina Stadium, Kosovo, https://www.youtube.com/watch?v=8FL3p9nEUHY, (accessed 7 August 2019).

Moving beyond definitional concerns, the ICTY sought to address the broader categorisation of rape for its own prosecution purposes. In line with the precedent established by the ICTR, the Tribunal found that rape is a type of sexual violence and that the *Akayesu* definition of sexual violence was applicable.[120] Also like the ICTR, the ICTY sometimes used rape and sexual violence interchangeably without accounting for this.[121] The Yugoslavian Tribunal also concluded that rape can constitute an outrage upon human dignity[122] and a form of torture.[123] Yet, like the Rwandan Tribunal, it rarely charged and prosecuted male-female rape on either of these grounds.[124]

In contrast, the role of women as perpetrators was not recognised in a single prosecution, either under a charge of rape or any other cloaking prosecution device. In the *Prosecutor v. Biljana Plavšić* (2003),[125] for example, the all-male Trial Chamber[126] established that Plavšić, former president of Republika Srpska, supported acts of rape amongst other crimes committed by Serbian forces against Bosnian Muslim, Bosnian Croat and other non-Serbs.[127] Plavšić was charged only with crimes of genocide and

[120] *Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić and Zoran Žigić (Trial Judgment)*, IT-98-30/1-T, ICTY, 2 November 2001, para 180. See also Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation', Office of the UN High Commissioner for Human Rights, (2012), 1-41: https://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf, (accessed 27 August 2019), p.5; fn 5. In contrast, the ICC did not refer to any specific acts in its definition of sexual violence. Instead, it simply referenced acts of a sexual nature. See ICC, Elements of Crimes, 2011, Article 7 (1) (g)-6, Article 8 (2) (b) (xxii)-6, Article 8 (2) (e) (vi)-6.
[121] See for example, *Kunarac (Trial Judgment)*, para 30.
[122] See for example *Furundžija (Trial Judgment)*, para 44.
[123] *Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić (Trial Judgment)*, IT-96-21-T, ICTY, 16 November 1998; UN ICTY: https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases, (accessed 6 July 2020).
[124] For a complete list of the cases of sexual violence prosecuted and their outcomes, see Kate Vigneswaran, 'Annex B: Charges and Outcomes in ICTY Cases Involving Sexual Violence', in Baron Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford: Oxford University Press, 2016), 429-82; Oosterveld, 'Sexual Violence Directed Against Men and Boys', p.115.
[125] *Prosecutor v. Biljana Plavšić (Sentencing Judgment)*, IT-00-39&40/1-S, ICTY, 27 February 2003.
[126] It consisted of Judge May (presiding), Judge Patrick Robinson (Jamaica) and Judge O-Gon Kwon (South Korea).
[127] *Plavšić (Sentencing Judgment)*, paras 29; 34; 126, fn 52; Case Information Sheet, Plavšić, IT-00-39&40/1, ICTY, p.5.

crimes against humanity, which took no account of the evidence indicating her complicity in crimes of rape.[128] These charges were eventually dropped when she pleaded guilty to persecutions on political, racial and religious grounds as a crime against humanity. Plavšić was sentenced to eleven years' imprisonment.[129]

Male-male rape was similarly either overlooked or described as something else other than rape, for example, torture. In the *Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić* (1998),[130] Mucić, Delić and Delalić were charged with acts of cruel and inhuman treatment for forced fellatio between two imprisoned brothers, rather than rape (see Appendix 2).[131] Judge Adolphus G. Karibi-Whyte, (presiding, Nigeria), Judge Saad Saood Jan (Pakistan) and Judge Elizabeth Odio Benito (Costa Rica), the only female on the panel, concluded that this offence '*could* constitute rape for which liability could have been found if pleaded in the appropriate manner'.[132] Similarly, Police Chief Todorović was charged with rape as a crime against humanity,[133] for forcing male detainees to perform oral sex on each other,[134] and for forcing a detainee to bite another detainee's penis.[135] Heard by an all-male panel, including Judge

[128] Plavšić was originally charged with 'two counts of genocide, five counts of crimes against humanity, and one count of violating the laws of war.' Case Information Sheet, Plavšić, IT-00-39&40/1, ICTY.
[129] In 2002, Plavšić plead guilty to persecutions on political, racial and religious grounds and was sentenced to eleven years' imprisonment. See Case Information Sheet, Plavšić, IT-00-39&40/1, ICTY. The Trial Chamber stated that, '[h]er guilty plea (together with remorse and reconciliation), voluntary surrender, post-conflict conduct and age are substantial mitigating circumstances.' Press Release, 'The Prosecutor v. Biljana Plavšic: Trial Chamber Sentences the Accused to 11 years' Imprisonment', ICTY, CC/P.I.S./734-e, 27 February 2003**:** http://www.icty.org/en/press/prosecutor-v-biljana-plav%C5%A1ic-trial-chamber-sentences-accused-11-years-imprisonment, (accessed 5 September 2019; see *Prosecutor v. Momcilo Krajisnik and Biljana Plavšić (Amended Consolidated Indictment)*, IT-00-39&40-PT, 7 March 2002; see *Prosecutor v. Momcilo Krajisnik and Biljana Plavšić (Plea Agreement)*, IT-00-39&40-PT, 30 September 2002.
[130] *Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić (Trial Judgment)*, IT-96-21-T, ICTY, 16 November 1998.
[131] Ibid, paras 26; 1060-2; 1064-6. Though Mucić was initially found guilty of these charges, Delić and Delalić were not. Mucić's charge for inhuman treatment was reversed on appeal. The cruel treatment conviction was upheld. See Appendix 2 and *Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić (Appeal Judgment)*, IT-96-21-A, ICTY, 20 February 2001.
[132] *Mucić et al. (Trial Judgment)*, para 1066, (emphasis added).
[133] *Prosecutor v. Stevan Todorović (Sentencing Judgment)*, IT-95-9/1-S, ICTY, 31 July 2001, para 3.
[134] Ibid, paras 9; 39.
[135] Ibid, para 38.

Patrick Robinson (presiding, Jamaica), Judge May and Judge Mohamed Fassi Fihri (Morrocco), these acts were later described as sexual assaults[136] and charged a form of persecution on political, racial and religious grounds following a plea agreement from Todorović.[137] This Judgment was referred to in the *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić* (2003).[138] The Trial Chamber, which consisted of two women judges, Mumba, (presiding) and Sharon A. Williams (Canada), and Judge Per-Johan Lindholm (Finland), described the anal rape of a detainee with an object as well as instances of forced oral sex between male detainees, and by detainees on Todorović as a form of sexual assault[139] amounting to torture.[140] In the *Prosecutor v. Mladen Naletilić aka 'Tuta', Vinko Martinović aka 'Stela'* (2003),[141] heard by Judge Liu Daqun (presiding, China) alongside two female judges, Maureen Clark (Republic of Ireland) and Fatoumata Diarra (Mali), forced oral sex between a male detainee and a soldier was not even described or charged as rape.[142] It appears only as evidence to support prosecution of other crimes (see Appendix 2).

Yet in the *Prosecutor v. Ranko Češić* (2004),[143] the exclusively male bench made up of Judge Alphons Orie (presiding, the Netherlands), Judge Daqun and Judge Amin El Mahdi (Egypt) found the defendant guilty of rape and humiliating and degrading treatment for forcing[144] two Muslim brothers to perform fellatio on one another in front of others.[145]

---

[136] Ibid para 36.
[137] Ibid, para 4. These charges are clarified in the *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić (Trial Judgment)*, IT-95-9-T, ICTY, 17 October 2003, paras 39; 21. Initially, Todorović was 'a co-accused in this case, until he pleaded guilty and became a witness for the Prosecution.'
[138] *Simić et al (Trial Judgment)*.
[139] Ibid, 728
[140] Ibid, para 772.
[141] *Prosecutor v. Mladen Naletilić aka 'Tuta', Vinko Martinović aka 'Stela' (Trial Judgment)*, IT-98-34-T, ICTY, 31 March 2003.
[142] Ibid, para 464.
[143] *Prosecutor v. Ranko Češić (Sentencing Judgment)*, IT-95-10/1-S, ICTY, 11 March 2004.
[144] Češić plead guilty to, amongst other crimes, one count of 'sexual assault, charged under one count of crime against humanity (rape) and one count of a violation of the laws or customs of war (humiliating and degrading treatment)'. Ibid, para 33.
[145] Ibid, paras 13-4.

This apparent advancement in male-male rape prosecutions by the ICTY did not establish a definitive position. In the *Prosecutor v. Momčilo Krajišnik* (2006),[146] another all-male bench consisting of Judge Orie (presiding), Judge Joaquín Martín Canivell (Spain) and Judge Claude Hanoteau (France) heard that Croat and Muslim male detainees were forced to perform sexual acts with one another in the presence of fellow detainees.[147] No further information was provided for the types of sexual offences committed. These acts were broadly referred to as types of sexual violence and categorised as persecution through cruel or inhumane treatment.[148] However, Judge Pocar (presiding), Judge Shahabuddeen, Judge Güney, Judge Meron and Judge Andrésia Vaz (Senegal) – the only female on the panel – reversed these charges on appeal.[149] Moreover, in the *Prosecutor v. Milan Martić* (2007),[150] heard by Judge Bakone Justice Moloto (presiding, South Africa), Judge Frank Höpfel (Austria) and Judge Janet Nosworthy (Jamaica), again the only woman sitting on the bench, evidence of male-male rape was entered only as a footnote (see Appendix 2).[151] Significantly, in the *Prosecutor v. Radoslav Brđanin* (2004)[152] – heard by Judge Carmel Agius (presiding, Malta) alongside two female judges, Ivana Janu (Czech Republic) and Chikako Taya (Japan) – the Trial Chamber considered evidence of a male being forced to rape a female prisoner, but determined that only the female was violated.[153]

The judgment commentary and sentencing in these cases fail to explain why each

[146] *Prosecutor v. Momčilo Krajišnik (Trial Judgment)*, IT-00-39-T, ICTY, 27 September 2006.
[147] Ibid, paras 304; 800.
[148] *Krajišnik (Trial Judgment)*, paras 745; 1126.
[149] *Prosecutor v. Momčilo Krajišnik (Appeal Judgment)*, IT-00-39-A, ICTY, 17 March 2009, para 820.
[150] *Prosecutor v. Milan Martić (Judgment)*, IT-95-11-T, ICTY, 12 June 2007.
[151] Ibid, fn 899.
[152] *Prosecutor v. Radoslav Brđanin (Trial Judgment)*, IT-99-36-T, ICTY, 1 September 2004.
[153] In 1992, Omarska camp guards attempted to force Mehmedalija Sarajlić, a Bosnian Muslim male, to rape a female detainee. By majority, the Trial Chamber found that 'the threat of rape constituted a sexual assault *vis-à-vis* the female detainee'. Ibid, para 516, (original emphasis); Oosterveld, 'Sexual Violence Directed Against Men and Boys', pp.112. Initially found guilty of torture and persecution for acts of rape, the verdict was later reversed on appeal in the *Prosecutor v. Radoslav Brđanin (Appeal Judgment)*, IT-99-36-A, ICTY, 3 April 2007. See Appendix 2.

act was charged differently. In *Mucić et al.*,[154] Mucić, pleaded not guilty and was sentenced to nine years' imprisonment.[155] Though seven years of the sentence was imposed for acts of cruel and inhumane treatment,[156] the Judgment did not indicate what portion of the sentence was given for the crime of forced fellatio. The charge for inhuman treatment was later reversed on appeal, but the cruel treatment conviction was upheld (Appendix 2). The *Simić et al.* Judgment is equally vague. Simić pleaded guilty and received seventeen years' imprisonment.[157] Tadić and Zarić both pleaded not guilty and received eight and six years' imprisonment, respectively.[158] In *Češić* and *Todorović*, the defendants pleaded guilty[159] and received eighteen and ten years' imprisonment each.[160] Krajišnik pleaded not guilty and was sentenced to 27 years' imprisonment.[161]

In all of the cases cited here, a range of other charges (including murder and torture)[162] were listed in the sentencing. The sentence given for each offence is therefore indistinguishable. In some of the judgments, emphasis was not placed on the seriousness of the charges, but on mitigating factors and the indication of remorse.[163] The sentencing could be linked to the rank of those individuals being prosecuted and the level of expectation to maintain discipline and honour amongst troops. Without clarification from

[154] Delalić was found not guilty on all charges brought against him. Delić was not found guilty on counts 44 and 45, acts of cruel and inhuman treatment. See *Mucić et al*. *(Trial Judgment)*, para 1285.
[155] Ibid.
[156] Ibid.
[157] Ibid, para 1118.
[158] Ibid, paras 1122; 1126.
[159] *Češić* (*Sentencing Judgment)*, paras 56-60; *Todorović* (*Sentencing Judgment)*, paras 75-82.
[160] *Češić* (*Sentencing Judgment)*, para 111; *Todorović* (*Sentencing Judgment)*, para 117.
[161] *Krajišnik (Trial Judgment)*, para 1183. In 2009, following appeal, the sentence was reduced to 20 years imprisonment. See *Prosecutor v. Momčilo Krajišnik (Appeal Judgment)*, ICTY, 17 March 2009, para 819.
[162] In *Todorović*, murder, sexual assaults and beatings were grouped together. *Todorović* (*Sentencing Judgment)*, paras 36-41.
[163] Simić pleaded guilty, but demonstrated no remorse for his crimes. *Simić et al. (Judgment)*, para 1087. Tadić and Zarić both pleaded not guilty but were considered to have shown remorse. *Simić et al.* Trial Judgment, paras 1098; 1111. In *Češić* and *Todorović*, the defendants pleaded guilty and exhibited remorse. *Češić* Sentencing Judgment, paras 63-66; *Todorović* (*Sentencing Judgment)*, paras 89-92; 114. *Todorović* (*Sentencing Judgment)*, paras 89-92. In contrast, no reference was made to remorse in Mucić sentencing, *Mucić et al*. (*Trial Judgment)*. This was the case also in the *Krajišnik* Judgment sentencing, *Krajišnik* Trial Judgment.

the courts, this possible explanation remains unsubstantiated. Though the details given on the composition of the judiciary in individual cases suggest that this could have influenced the outcome in each of these cases, measuring this dimension is equally challenging.

Regardless, the Tribunal's approach to male-male rape underlines wider problems regarding how such acts are understood and categorised in international law. By failing to prosecute male-male rape as rape, the sexual element of the crime is obscured as are other implicit assumptions about rape and responsibility.[164] It reinforces the idea that rape as a sexual offence only affects women.[165]

(c) The International Criminal Court

As part of the ICC's establishment in 2002, the Rome Statute listed the crimes, which the ICC should have jurisdiction over and provided clarification for what constitutes each of these crimes in its Elements of Crimes (EoC, 2002).[166] The Rules of Procedure and Evidence (RPE, 2002)[167] were introduced to provide detailed rules for the Court.[168] In evolving the EoC definition of rape (see Appendix 1),[169] the ICC aimed to provide an approach which incorporated (assumed) domestic norms and international considerations and specificities.[170] It referred to the *Akayesu* and *Furundžija* definitions of rape as well as national laws.[171]

---

[164] Oosterveld, 'Sexual Violence Directed Against Men and Boys', p.115.
[165] Ibid.
[166] ICC, *Elements of Crimes*, 2011; Knut Dörmann, 'War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes', in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law, Volume 7*, (Netherlands: Brill, 2003), p.350.
[167] ICC, Rules of Procedure and Evidence, 2013 Second Edition.
[168] Triestino Mariniello, '"One, No one and one hundred thousand": Reflections on the Multiple Identities of the ICC', in Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity*, (London: Routledge, 2015), 1-14, p.13.
[169] ICC, EoC Article 7 (1)(g)-1 Crime against humanity of rape; Article 8 (2)(b)(xxii)-1 War crime of rape; and Article 8 (2)(e)(vi)-1 War crime of rape.
[170] Oosterveld, 'Influence of Domestic Legal Traditions', pp.834-5.
[171] The ICC referred to the *Akayesu*, *Mucić et al.* and *Furundžija* Judgments. The *Musema*, *Kunarac*, *Kvočka* Judgments were not referenced because they had not been rendered when the EoC was drafted (2

Though the Court attempted to amalgamate all three areas of law and practice in order to achieve the best possible working definition, the EoC definition most resembles the *Furundžija* mechanical definition.[172] Unlike the *Furundžija* definition, the EoC employed the term 'invasion'[173] in order to reinforce rape as gender-neutral.[174] Despite its inclusive intentions, some critics argue that the term is redundant in this context, because the acts described in the EoC require 'penetration of body parts by other body parts or objects'.[175]

The EoC has also been criticised for introducing the element of consent as a form of defence.[176] The definition of consent is provided in Rule 70 of the RPE, which states that in incidents involving sexual violence, including rape:

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;[177]

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

November 2000). See De Brouwer, *Supranational Criminal Prosecution*, p.130.

[172] Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent', *Columbia Human Rights Law Review*, (2001), 32, 625-75, p.648.

[173] ICC, EoC Article 7 (1) (g)-1; Article 8 (2)(b)(xxii)-1; and Article 8 (2)(e)(vi)-1.

[174] 'The concept of "invasion" is intended to be broad enough to be gender-neutral'. Ibid, fns 15; 50; 63.

[175] De Brouwer, *Supranational Criminal Prosecution*, p.131.

[176] In contrast to national law, 'international law does not count nonconsent of the victim as an element of crimes of sexual violence' and rape'. Schomburg and Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law', p.123. It is important to note that 'non-consent was not made an element of the crime that must be proven, thereby taking a very different approach than many domestic jurisdictions, although consent can be raised as a defence in certain limited circumstances (as in many domestic jurisdictions).' Oosterveld, 'The Influence of Domestic Legal Traditions on the Gender Jurisprudence of International Criminal Tribunals', p.836.

[177] As discussed earlier, this language remains problematic.

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.[178]

While Rule 70 seeks to provide a general standard for consent it avoids, as had the ICTY in *Kunarac*, to mention any age dimension to the concept of consent or its lack. It establishes only that 'no inference of consent may be drawn from a lack of resistance or silence', thereby avoiding the challenge involved in achieving an international consensus on age.[179] The EoC reinforces this vagueness in the understanding of non-consent under coercive circumstances.[180] On the one hand, Rule 70 prevents the use of consent as a form of defence when the victim is incapable of providing 'genuine consent' but it omits to clarify what amounts to consent that can be considered 'genuine'.[181] Only once it was established that the victim was capable of legally consenting, would consideration then be given to whether force, threats, or coercion prohibited the victim from exercising free will (though no clarification is provided regarding what constitutes force, threats, or coercion). In the event that these methods were used to secure consent, Rule 70 states that consent given is invalid. However, this statement is undermined by lack of precision over what constitutes capacity to give 'genuine consent' and lack of clarity on how this can be expressed in comprehensible terms.

Though the Rules of Procedure and Evidence (RPE) of the ICC failed to expand on what is meant by the term 'genuine consent', the EoC provided clarification in its footnotes: '[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.'[182] This description is challenging

[178] ICC, RPE, Rule 70.
[179] Ibid, ICC, RPE, Rule 70(c).
[180] Boon, 'Rape and Forced Pregnancy', p.652.
[181] ICC, RPE, Rule 70(a),(b).
[182] ICC, EoC, fns 16; 51; 64 in reference to Article 7 (1)(g)-1; Article 8 (2)(b)(xxii)-1; and Article 8

because it remains unclear what the Court meant by the terms 'natural' and 'induced' incapacity or how these incapacities are understood and measured. Other barriers to providing 'genuine consent', such as different languages between the accused and alleged victims remain undiscussed.

The EoC definition of enforced sterilisation,[183] a form of sexual violence, introduced a second separate definition of 'genuine consent'. It states that '"genuine consent" does not include consent obtained through deception.'[184] In armed conflict, rape often occurs because of deception. During WWII, brothels were created in Nazi concentration camps. Women detainees were encouraged to participate in forced sexual labour under the fiction that they would be released after six months.[185] At the same time, the Imperial Japanese Army established brothels, referred to as comfort stations, in occupied territories. Women and girls, known as 'comfort women', were subsequently sexually enslaved and raped in these stations. These victims were often deceived with the promise of employment prospects.[186] During the Yugoslav conflict, rape camps were established, and women were fraudulently detained within them.[187] The ICTY *Kunarac* Trial Chamber addressed the issue of deception as an element of rape. Under the heading 'Specific circumstances which go to the vulnerability or *deception* of the victim',[188] it established that a number of national jurisdictions state that consensual sexual intercourse

(2)(e)(vi)-1 and the use of the term 'genuine consent' in these Articles.
[183] ICC, EoC Article 7 (1)(g)-5 Crime against humanity of enforced sterilization; Article 8 (2)(b)(xxii)-5 War crime of enforced sterilization; Article 8 (2)(e)(vi)-5 War crime of enforced sterilization, Element 2.
[184] ICC, EoC Article 7 (1)(g)-5; Article 8 (2)(b)(xxii)-5; Article 8 (2)(e)(vi)-5, fns 20; 55; 68.
[185] Janie L. Leatherman, *Sexual Violence and Armed Conflict*, (Cambridge and Malden, MA: Polity Press, 2011), p.2012.
[186] See Carmen M. Argibay, 'Sexual Slavery and the Comfort Women of World War II', *Berkeley Journal of International Law*, (2003), 21(2), 375-89.
[187] Other women were abducted and detained against their will. See Alexandra Stiglmayer (ed.), *Mass Rape: The War Against Women in Bosnia-Herzegovina*, (Lincoln, NA and London: University of Nebraska Press, 1994).
[188] *Kunarac* Trial Judgment, para 446, (emphasis added).

is invalid if the victim was '*induced into the act by surprise or misrepresentation.*'[189] It remains unclear why deception was excluded as an issue in determining genuine consent from the EoC definition of rape and the RPE definition of consent.

Theoretically the EoC definition of rape and the RPE definition of consent represents a methodical approach to determining cases of rape in international law. In practice, this response is inadequate given the contexts in which rape occurs in armed conflict.[190] Though consent has traditionally been considered crucial for preserving sexual autonomy, its usefulness in the criminalisation of rape in international law is less clear.[191] The central issue is how consent and individual agency and autonomy are measured in armed conflict.[192] Critics argue that the ICC provisions do not sufficiently reflect the impact that the environment of armed conflict has on a person's ability to legally consent and mobilise individual agency and autonomy.[193]

The EoC definition of rape was developed with the aim of achieving a balance, which took note of the contextual differences between the ICTY and the ICTR definitions of rape, alongside an implicit acknowledgment of lessons taken on board from national legislation.[194] However, the ICC has, to date, only applied the definition in the *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo* (2016).[195] Interestingly for this thesis, the Pre-Trial Chamber did not affirm the

[189] The ICTY in the *Furundžija* case did not address the issue of deception as an element of rape. See, *Kunarac* Trial Judgment, paras 446, (emphasis added) see also paras 447-52.
[190] Boon, 'Rape and Forced Pregnancy', p.653.
[191] Ibid, p.655.
[192] Ibid. In addition, Adrienne Kalosich, 'Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foča', *Women's Rights Law Reporter*, (2003), 4(2), 121-36, pp.121-2; Noelle Quénivet, *Sexual Offences in Armed Conflict and International Law*, (Ardsley, NY: Transnational Publishers, Inc., 2005).
[193] See for example, Fiona Tate, 'Impunity, Peacekeepers, Gender and Sexual Violence in Post-Conflict Landscapes: A Challenge for the International Human Rights Agenda', *Law, Crime and History*, (2015), 5(2), 69-96, p.87.
[194] Oosterveld, 'Influence of Domestic Legal Traditions', p.836.
[195] *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo (Trial Judgment)*, ICC, ICC-01/05-01/08, 21 March 2016.

charge of rape as a form torture or rape as an outrage upon human dignity.[196] The Chamber simply asserted that:

> in the context of the count of torture as a crime against humanity, the Chamber notes that also in the context of outrages upon personal dignity the Prosecutor presented the same conduct, related mainly to acts of rape... In the opinion of the Chamber, most of the facts presented by the Prosecutor at the Hearing reflect in essence the constitutive elements of force or coercion in the crime of rape, characterising this conduct, in the first place, as an act of rape. In the opinion of the Chamber, the essence of the violation of the law underlying these facts is fully encompassed in the count of rape.[197]

Though the all-female bench consisting of Judge Sylvia Steiner (presiding, Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan) initially found Bemba, the former Congolese vice-president, guilty of committing mass murder and rape in the Central African Republic (CAR) for the actions of his troops, he was later acquitted of all charges by Judge Christine Van den Wyngaert (presiding, Belgium), Judge Sanji Mmasenono Monageng (Botswana) – the only two females on the bench – alongside Judge Chile Eboe-Osuji (Nigeria), Judge Howard Morrison (UK) and Judge Piotr Hofmański (Poland).[198] Because *Bemba* so far is the only rape case to be heard by ICC, the EoC definition of rape as well as its broader categorisation as an outrage upon human dignity and torture has not been extensively tested in ICC judgments.[199]

---

[196] *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)*, ICC, ICC-01/05-01/08, 15 June 2009, for example paras 310, 312.
[197] Ibid, para 310.
[198] *Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 21 June 2016 entitled 'Decision on Sentence pursuant to Article 76 of the Statute'*, ICC, ICC-01/05-01/08 A2 A3, 8 June 2018, in particular para 7.
[199] Oosterveld, 'Influence of Domestic Legal Traditions', p.836.

It is important to note that the EoC and the RPE are not legally binding on either the ICC, being rules of guidance only, nor are they binding on other UN courts and tribunals.[200] While it can be argued that, the EoC on rape does present 'a detailed overview of the elements' involved in rape for use in prosecutions,[201] it still does not provide a conclusive response to the many challenges facing international law in defining rape. These include the issue of consent, the problems associated with the language of invasion versus penetration or the challenges associated with a mechanical-conceptual definition.[202] Challenges relating to its categorisation as an offence also remain unresolved.

(d) Comparative Analysis: The ICTY, the ICTR and the ICC

Overall, the ICTY, the ICTR and the ICC definitions of rape each present a number of challenges when attempting to identify what constitutes conflict-perpetrated rape. On the one hand, the *Akayesu* conceptual definition can be described as too vague. On the other, the language of 'penetration' captured in the *Furundžija* and *Kunarac* definitions reintroduces the traditional idea of rape as a crime of honour in international law.[203] The element of consent incorporated into the ICC and *Kunarac* definitions also raises concern.

[200] Anne-Marie L. M. de Brouwer, 'Supranational Criminal Prosecution of Sexual Violence', in Jackie Jones, Anna Grear, Anne Fenton and Kim Stevenson (eds), *Gender Sexualities and Law*, (Abingdon: Routledge, 2011), 201-12, p.202.
[201] Ibid.
[202] Ibid.
[203] Experts note that under the traditional model, rape is an act which damages the honour of not only of the woman who has been assaulted, but the man who owns her. See Nancy Farwell, 'War Rape: New Conceptualizations and Responses', *Affilia*, (2004), 19(4), 389-403, pp.394-5; Catherine N. Niarchos, 'Women, War, and Rape: Challenges Facing The International Criminal Tribunal for the Former Yugoslavia', *Human Rights Quarterly*, (1995), 17(4), 649-90, pp.672-6; Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, (London and The Hague: Kluwer Law International, 2001), pp.107-10; Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases', in Baron Serge Brammertz and Michelle Jarvis, (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford: Oxford University Press, 2016), 33-72, p.35; Copelon, 'Surfacing Gender', p.249.

One constant advance shared between each of these definitions is the framing of rape as gender-neutral. Despite this development, rape continues to be prosecuted as a crime primarily committed by men against women. The ICTR, for example, failed to prosecute any acts of male-male rape. Though the ICTY prosecuted some instances of male-male rape, such offences were often categorised as something else other than rape, for example, torture. Female-perpetrated rape committed against either gender, on the other hand, was largely side-lined by these bodies.[204] In contrast, male-female rape was often prosecuted as only rape or, sometimes, as rape and another type of headline offence, such as an outrage upon human dignity and torture. The categorisation of rape as a form of sexual violence has been shown to present yet another challenge. At times, each of these tribunals have used the terms 'rape' and 'sexual violence' interchangeably. The significance of this swapping of terminology warrants further investigation.

Overall, the reason for these inconsistencies is unclear. One possible explanation may be linked to the definitions. It is also highly likely that the individual judges played a significant role in these prosecution approaches. Their own gender and cultural biases are potential influencing factors when exploring the decisions in several of the cases discussed. In this context, it is equally plausible that cultural assumptions linked to the terms used to categorise rape impacted prosecution strategies and outcomes. This dimension will be focused on in Chapters 5-7.

Conclusion

On the surface, the ICTY, the ICTR and the ICC changed the legal structuring of conflict-

[204] For a discussion of female-perpetrated rape, see Nicole Hogg 'Women's participation in the Rwandan genocide: mothers or monsters?', *International Review of the Red Cross*, (2010), 92(877), 69-102.

perpetrated rape as a crime in international law. They provided individual gender-neutral definitions of the crime, framing it as a serious offence in its own right. Yet each of the bodies prosecuted rape in a way that perpetuated traditional gendered (essentially heteronormative) understandings of the crime. In the cases discussed, male-female rape was often prosecuted as rape or, occasionally, rape and another headline offence, such as torture or an outrage upon human dignity, while male-male rape was often ignored or prosecuted as another type of offence instead of rape, for example, torture. Female-perpetrated rape, on the other hand, was largely overlooked.

One potential explanation for this trend is the way in which experts interpreted the language used in these definitions. For example, reference to the term 'penetration' in the ICTY and the ICC definitions reinforces traditional notions of rape as a crime perpetrated by the man. The judiciary too may be influenced by their own cultural and gendered biases. The terms used to categorise rape seem also to continue to play a role. Building on the evidence presented so far, the next chapter examines one of the terms used to categorise rape in international law – sexual violence. The term 'gender-based violence' will be considered as a potential alternative to that concept.

Chapter 5

Sexual Violence

Introduction

The previous chapter examined the evolution of the different gender-neutral definitions of conflict-perpetrated rape created by the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017), the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) and the International Criminal Court (ICC, 2002-present). It established that the prosecution practices of these bodies did not properly reflect the gender-neutral dimension to these definitions. For example, male-female rape was typically prosecuted as rape or, sometimes, rape and another type of offence, such as an outrage upon human dignity or a crime of torture. Male-male rape, on the other hand, was routinely ignored or prosecuted as something other than rape, for example, torture. Female-perpetrated rape was largely overlooked. An added complication appears in the general categorisation of rape as a form of sexual violence. Rape and sexual violence are, at times, used interchangeably without explanation in both the scholarship and the courts. The significance of such swapping is unclear, which leads one to question the value of categorising rape as a form of sexual violence. Attempting to provide clarification, this chapter explores the term 'sexual violence', in order to determine its usefulness as part of a lexicon of rape in modern international law. As a potential alternative to this categorisation, the concept of gender-based violence will be examined in this chapter.

Central to this discussion will be the work of Michel Foucault and the reactions to his conceptualisation of rape and sexual violence generally. The ongoing theoretical challenges that his thinking presents to feminist theories, especially in relation to expression and production of power, is substantial, as feminist scholarship on law,

sexuality and gender underline. In particular, his assertions regarding the categorisation of rape as a form of sexual violence continue to provoke responses indicating his thinking still incites contention amongst feminists and supporters of his work.[1] His claims and the response to these will provide the focus for this chapter.

Sexual Violence

During the 1970s, when Western cultural attitudes towards sexuality and individual choice were being redefined, a French commission was tasked with reforming the French penal code.[2] As part of their research, they asked Foucault, seen as an established expert on such topics, questions relating to legislation on sexual crimes. Addressing these questions during a roundtable discussion concerning his book *Discipline and Punish*, Foucault argued that sexuality should be liberated from a disciplinary discourse and, in turn, that rape be desexualised as a form of criminal violence. He advocated that sexuality should not 'be the object of punishment' of rape.[3] Rather, it should be prosecuted on the same grounds as any other act of violence.[4] His perspective was that rape is simply another act of aggression.[5] He identified no difference 'between sticking one's fist into someone's face or one's penis into their sex [organ]'.[6] To imply that rape constitutes a more serious act of violence than punching an individual in the face suggests that 'sexuality as such, in the body, has a preponderant place, the sexual organ isn't like a hand, hair, or a nose', he

[1] See for example, Ann J. Cahill, 'Foucault, Rape and the Construction of the Feminine Body', *Hypatia*, (2000), 15(1), 43-63, p.43.
[2] Michel Foucault, 'Confinement, psychiatry, prison', in L. D. Kritzman (ed.), *Politics, philosophy, culture: Interviews and other writings, 1977-1984*, (translated, Alan Sheridan *et al.*), (New York, NY: Routledge, 1988), p.200.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Ibid.

argued.[7] Foucault concluded that rape 'isn't a matter of sexuality'. [8] Only the element of physical violence should 'be punished, without bringing in the fact that sexuality was involved.'[9] Categorising rape only as a crime of violence would, he believed, 'free women's bodies from the defining elements which produce them as pre-victims.'[10]

These and subsequent comments by Foucault have shaped much of the continuing debate regarding the categorisation or labelling of rape as a form of sexual violence. The discussions are complex. Some feminist activists such as Susan Brownmiller and equity feminist Christina Hoff Sommers also argue for the desexualisation of rape, albeit from a different standpoint to Foucault.[11] Others, such as feminist philosopher Ann Cahill, are critical of the violence only framework. In 2001, drawing on Foucault's analysis, she argues that by focusing on the penile perpetration, men are framed as central to the phenomenon of rape.[12] Foucault therefore forgets to analyse the bodies of the female victims, which are the expressions of any given power dialogue.[13] Rape, she continues, plays an important role in the discourse that frames women as both socially inferior and expendable, and her body as weak and violable.[14] For her, it is these issues that form the female's experience of rape and that must be taken seriously in law.[15] In failing to demonstrate a clear understanding of how gender, power, forces, and the law are interconnected, Foucault is seemingly concerned, albeit implicitly, only with liberating the

[7] Ibid, pp.201-2.
[8] Ibid, p.202.
[9] Ibid.
[10] Cahill, 'Foucault, Rape and the Construction of the Feminine Body', p.57.
[11] Susan Brownmiller, *Against Our Will: Men, Women and Rape*, (London: Secker and Warburg, 1975); Christina Hoff Sommers, *Who Stole Feminism?: How Women have Betrayed Women*, (London: Simon and Schuster, 1994).
[12] Ann J. Cahill, *Rethinking Rape*, (Ithaca and London: Cornell University Press, 2001), p.165.
[13] Cahill, 'Foucault, Rape and the Construction of the Feminine Body', p.58.
[14] Ibid.
[15] Ibid.

sexuality of men.[16] He omits to ask about the cultural and personal significance of being raped as a woman.[17]

Taking up this omission in the late 1980s, Italian born American gender theorist Teresa De Lauretis claimed that in terms of Foucault's theoretical analysis, his proposal could be understood as an attempt to counteract the 'technology of sex', which requires the social body, and all its individuals, to be placed under surveillance.[18] Worse, that it looks to break the established bond between crime and sexuality through this will to liberate sexual behaviours from punishment, and free the sexual sphere from state intervention. For De Lauretis, this form of resistance on behalf of imprisoned men who are or subject to be charged with rape, worked to increase and legitimise women's sexual oppression by failing to prioritise their experience as victims.[19] In other words, by recognising only the element of force as the criminal factor, not the sexual component, men's freedom not to be chastised for sexual misconduct or have their sexuality repressed is prioritised over securing justice for women. Given the traditional cultural constraints placed upon female sexuality, this superseding of women's potential will to see men punished for their sexual incontinence reinforces their relative powerlessness.[20]

The challenge for this thesis lies in the need to critique this argument in relation to conflict-perpetrated rape. Certainly, those feminists who dismiss Foucault's violence-only framework can be criticised for perpetuating the idea that women are passive victims, and that rape is the most harmful act that can be committed against them. Such a perspective

[16] Ibid, p.57; Holly Henderson, 'Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention', *Berkeley Journal of Gender, Law and Justice*, (2007), 22(1), 225-53, p.230.
[17] Cahill, *Rethinking Rape*, p.165.
[18] Teresa De Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction*, (Bloomindale, IN: Indiana University Press, 1987), p.37.
[19] Ibid.
[20] Monique Deveaux, 'Feminism and Empowerment: A Critical Reading of Foucault', in Susan Hekman (ed.), *Feminist Interpretations of Michel Foucault*, (Pennsylvania: Pennsylvania University Press, 1996), 211-40, p.225.

arguably encourages the use of rape as a weapon in armed conflict because of the damaging impact it is held to have on victims as well as on their families and community.

Returning to the broader debate, what is seen as central to the discontent over Foucault's stance is his comparison between genitalia and other body parts. Holly Henderson in 2007 challenged his conclusions regarding the significance of human physicality, pointing out that communities tend to view hands and hair as socially different to genitalia. Because of these differences rape, she argues, is not just an attack against the body: it is an attack on the sexualised, gendered body, making it more significant than non-sexualised forms of battery.[21] Sex organs, unlike other body parts, are imbued with a sexual, social meaning. Back in 1988, Winifred Woodhull maintained that if we are to fully understand rape as a phenomenon, we must explore how the penis is understood and described under certain circumstances as a masculine weapon, and how the female vagina, in response, is held and exploited as a site of vulnerability.[22] Failing to engage with the social connotations ascribed to the genitals not only ignores the victim's experience, but fails to consider the political and social contexts in which rape was used.[23]

Foucault's perspective is not without flaws, but neither are the various stances adopted by his critics. Those like Woodhull and Henderson who continue to reject Foucault's argument about desexualising violence fail to acknowledge how an oversexualising of particular body parts ignores the violation of or use of other body parts in rape.[24] Here, Cahill adds another perspective. If, as Foucault concluded, it is 'upon the

[21] Henderson, 'Feminism, Foucault, and Rape', 211-40, p.250.
[22] Winifred Woodhull, 'Sexuality, Power, and the Question of Rape', in Irene Diamond and Lee Quinby (eds), *Feminism and Foucault: Reflections on Resistance*, (Boston, MA: Northeastern University Press, 1988), 167-76, p.171. The popular use in many different languages of euphemisms for the penis of a weapon nature, including the flesh sword for example, underlines this point.
[23] Henderson, 'Feminism, Foucault, and Rape', p.249.
[24] Foucault examined this historical process in *The history of sexuality: Vol.1, An introduction*, (New York, NY: Random House, Inc., 1990). Cahill 'Foucault, Rape and the Construction of the Feminine Body', p.45-6.

basis of the social construction of the sexual body' that the genitalia and associated sexuality are held to be central to an individual's identity, then there is an 'ethical imperative' towards desexualisation of rape.[25]

Despite her reservations about the degree of emphasis placed on certain parts of the sexualised body as part of her resistance to the objectification of women, Cahill still insists that rape must be distinguished from other types of battery because the body plays a pivotal role in the construction of the feminine identity.[26] Her philosophical position is that rape is different to a punch in the arm because the danger of being harmed by the penis is at the basis of feminine bodily comportment, which requires female behaviour that serves to protect their bodies from a sexualised attack.[27] It places the burden on women to conduct and dress in ways that are identified as non-provocative.

Invoking the work of feminist political theorists, especially Iris Young, and fellow philosopher and gender expert Sandra Bartky, Cahill has continued to reflect not just upon rape but also on the wider contextualisation of the feminine, including bodily comportment. She describes women as continuing to be marked by fear of bodily desires and harm where they are under cultural pressure to perceive their bodies as being responsible for making these dangers possible.[28] Such pressure conveys a message that should an individual woman act or appear in a way that moves her beyond the prescribed safe zone for her, harm of some kind, up to and including rape, should be expected as the likely consequence.[29] This idea, she argues, serves to institutionalise the notion that rape is a basic element of the female experience as a general phenomenon, by using physical

[25] Cahill, 'Foucault, Rape and the Construction of the Feminine Body', pp.45-6.
[26] Ibid, p.43.
[27] Ibid, p.60.
[28] Ibid, p.52.
[29] This echoes a point made by Fitzjames Stephen, the noted Victorian jurist, to the effect that for women, 'submission and protection are correlative'. See James Fitzjames Stephen, *Liberty, Fraternity, Equality*, 3 vols, (London: MacMillan, 1883), p.209.

objectification as the channel for warning potential female transgressors. For Cahill, it is at the heart of the 'social means of sexual differentiation' in that it ensures that similar conduct such as travelling alone, at night, or in a particular locale, has radically different meanings and effects for men and women.[30] This viewpoint, she insists, justifies sustaining a perspective that female rape should be approached differently so that its meanings can be voiced and heard as part of the construction of the feminine. The feminine body is, then, not only culpable for any harm committed upon it but is, as Cahill puts it, a 'pre-victim'.[31] Such feminine behaviour is linked, she contends, to the issue of social sexing. Whilst 'boys serve a veritable apprenticeship in violence, developing their aggressiveness',[32] girls give up such aggressive endeavours and develop feminine traits such as passivity and victimhood.[33] Until that changes, the Foucauldian approach cannot work.

For feminists like Cahill, then, Foucault's analysis fails to engage with the complex social reality which is not only central to the subordination of women to men, but reinforces rape as merely a violent form of heteronormative socialisation.[34] Reinforcing her point, Cahill writes:

> [W]omen who experience rape and the threat of rape on a daily basis, and whose very bodily behaviour and beings are in part formed by the presence of the threat of rape, will not be liberated in any sense by a redefinition of rape which excludes its constitutive and oppressive effects upon their existence.[35]

Cahill concludes that the level or type of physical and mental harm endured is very

[30] Cahill, 'Foucault, Rape and the Construction of the Feminine Body', p.59.
[31] Ibid, p.52.
[32] Simone de Beauvoir, *The Second Sex*, (translated, Constance Board and Sheila Malovany Chevallier), (London: Vintage Books, 1993), p.397.
[33] Ibid; Emilia Aaltonen, 'Punching Like a Girl: Embodied Violence and Resistance in the Context of Women's Self-Defense', *Journal of International Women's Studies*, (2012), 13(2), 51-65, p.53.
[34] Henderson, 'Feminism, Foucault, and Rape', pp.231-2.
[35] Cahill, 'Foucault, Rape and the Construction of the Feminine Body', p.58.

different when a hand or hair has been assaulted, as opposed to the genitalia.

For Foucault, on the other hand, as his subsequent responses to initial feminist criticism made plain, it is women who need to change their stance. They are choosing to remain imprisoned in traditional attitudes. His theories of power suggest the potential for the individual to 'effect by their own means or with the help of others a certain number of operations on their own bodies and souls, thoughts, [and] conduct'.[36] Foucault argues that traditional political and gender hierarchies are sustained by the docile body – the acceptance of the physical weakness produced by mental subordination in line with traditional thinking.

Hostility towards Foucault's violence only model remains largely unabated amongst many feminist scholars. From De Lauretis and Woodhull, via Cahill to more recent commentators such as Maja Korac, there is agreement that if rape were described solely as a crime of violence, then the sexually aggressive behaviour inherent to the offence, typically perpetrated by men, would become legally irrelevant.[37] This categorisation, Korac insists, works to diminish its seriousness, including in the context of conflict-perpetrated rape.[38] To emphasise her ongoing support for this perspective, Cahill compares rape to sexual harassment. If sexual harassment were categorised solely as a form of professional harassment, with the sexual element deemed immaterial, crucial elements or aspects of behaviour would be rendered invisible, she argues.[39] For her:

> The behaviour itself could not be understood in terms of exercising privileges that have been traditionally and unfairly extended to men at the expense of women. *In a similar way, defining and therefore approaching rape as if sex*

[36] Michel Foucault, 'Technologies of the Self', Lectures at University of Vermont, October 1982, *Technologies of the Self*, (Massachusetts, MA: University of Massachusetts Press, 1988), 16-49, p.18.
[37] Maja Korac, 'Feminists Against Sexual Violence in War: the Question of Perpetrators and Victims Revisited', *Social Sciences,* 7, (2018), 182-95.
[38] Ibid; Cahill, 'Foucault, Rape and the Construction of the Feminine Body', p.57.
[39] Ibid, p.59.

were irrelevant would render impossible a consideration of rape's privileged role in the power discourse which is sexual hierarchy.[40]

In other words, for the sake of equity, the sexual dimension to rape has to be preserved; to not would diminish its impact on the wider struggle to achieve equality between women and men.

One problem with these arguments, as the case study Cahill invokes underlines, is that there is a failure to take into consideration instances of male-male and female-perpetrated rape. An evaluation of how other crimes committed against women, whereby the same power dynamics are present, but do not include reference to the sexual dimension is also absent. It ignores, for example, the harm caused to women who are battered, but are not raped or that resulting from a male employer bullying or manipulating a female employee.[41]

A vigorous comeback to Foucauldian arguments that removing the sexual element would enable implicit assumptions relating to culpability and the bodily comportment expectations of female sexuality to be eradicated came from Monique Plaza, a French feminist.[42] Writing in 2005, she argues that Foucault frames women as wanting to make rape as 'something other than aggression' for their own advantage, a stance they identify as both pansexualist and equally repressive.[43] For Cahill, continuing the debate later into the twenty-first century, the issue remains that 'recognizing the role of such discourses in an overarching and markedly un-natural sexual hierarchy', amounts to making claims for

[40] Ibid, (emphasis added).
[41] See, for example, Elizabeth M. Schneider, 'The Violence of Privacy' in Martha Fineman and Roxanne Mikitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, (New York: Routledge, 1994); Renate Klein 'Just Words? Purpose, Translation and Metaphor in Framing Sexual and Domestic Violence Through Language', in Renate Klein (ed.), *Framing Sexual and Domestic Violence Through Language*, (Basingstoke: Palgrave Macmillan, 2013).
[42] Cahill, 'Foucault, Rape and the Construction of the Feminine Body', p.59.
[43] Monique Plaza, 'Our Costs and Their Benefits', in Diana Leonard and Lisa Adkins (eds), *Sex in Question: French Materialist Feminism*, (London and Bristol, PA: Taylor & Francis, 2005), 178-89, p.185.

a '"natural" women's sexuality' which enjoys dominance.[44] Such arguments need to be dismissed, she believes, so that sexuality and sexual acts can instead be formally recognised as socially constructed, in terms of both impact and consequences. The role played by such perspectives form part of 'a larger system of sexual hierarchy', which is intrinsically oppressive of women also needs to be acknowledged.[45] She maintains that failure to 'include sex in the legal definition of rape makes precisely this recognition impossible.'[46]

For Cahill, another problem with Foucauldian theory lies in its focus on the traditional cultural and legal understanding of rape as constituting penile-vaginal penetration. She points out that even in states where the focus remains on the vagina, it is broadly accepted that rape can be committed with numerous tools.[47] Since Foucault's conceptualisation of rape focuses on the penis, it does not enable a consideration of the different ways in which a woman can be sexually violated.[48] This approach reintroduces the traditional idea of rape as a crime of honour.[49] As Gay McDougall observes, 'the historic focus on the act of penetration largely derives from a male preoccupation with assuring women's chastity and ascertaining paternity of children', in order to preserve the

[44] Cahill, 'Foucault, Rape and the Construction of the Feminine Body', p.59.
[45] Ibid.
[46] Ibid.
[47] Ibid, p.45.
[48] Ibid.
[49] Experts note that under the traditional model, rape is an act which damages the honour of not only of the woman who has been assaulted, the man who owns her. See for example, Nancy Farwell, 'War Rape: New Conceptualizations and Responses', *Affilia*, (2004), 19(4), 389-403, pp.394-5; Catherine N. Niarchos, 'Women, War, and Rape: Challenges Facing the International Criminal Tribunal for the Former Yugoslavia', *Human Rights Quarterly*, (1995), 17(4), 649-90, pp.672-6; Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, (London and The Hague: Kluwer Law International, 2001), pp.107-10; Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases', in Brammertz and Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, 33-72, p.35. 'Where rape is treated as a crime against honor, the honor of women is called into question and virginity or chastity is often a precondition. Honor implies the loss of station or respect; it reinforces the social view, internalized by women, that the raped woman is dishonorable.' Rhonda Copelon, 'Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law', *Hastings Women's Law Journal*, (1994), 5(2), 243-66, p.249.

primary value of the masculine bloodline.[50] This understanding undermines the characterisation of rape as a crime 'connected to a broader pattern of violent conduct', lessening the seriousness of the offence.[51]

Whilst some pro-sexual violence labelists acknowledge that rape is not limited to penile-vaginal penetration, their analysis is equally insufficient, focusing primarily on instances of male-female rape. Cahill, for example, insists that while men can be raped, they are not subject to the same persistent risk of rape that women are.[52] Nor are they raped at the same rate as women.[53] Cahill perceives rape as a tool used by men to control women.[54] Plaza similarly writes:

> *Rape is an oppressive act exercised by a (social) man against a (social) woman, which can be carried out by the introduction of a bottle held by a man into the anus of a woman* [without consent]; in this case rape is not sexual, or rather it is not genital. It is very sexual in the sense that it is frequently a sexual activity, but above all in the sense that it opposes men and women: it is social sexing which underlines rape.[55]

Though the arguments presented thus far have raised some important points, they have not sufficiently explained for this thesis why an assault on the vagina has to be seen legally, as well as culturally, more significant than an assault on non-sexual body parts. Rather, such arguments appear be circular: why is rape different from battery? Rape possesses a distinctive gender element. Why does it have a particular gender element?

---

[50] UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic rape, sexual slavery and slavery-like practices during armed conflict: final report / submitted by Gay J. McDougall, Special Rapporteur*, 22 June 1998, E/CN.4/Sub.2/1998/13, para 24.
[51] Jarvis and Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases', p.34. See also Copelon, 'Surfacing Gender', p.249.
[52] Cahill, 'Foucault, Rape and the Construction of the Feminine Body', p.45.
[53] Ibid.
[54] Ibid.
[55] Plaza, 'Our Costs and their Benefits', pp.186-7, (original emphasis)

Because rape differs from battery. It remains unclear why rape should be distinct from these offences as opposed to forming part of them.

Several experts have, from the start, been critical both of Foucault's arguments as well as the circularity of the thinking of feminist scholars like De Laurentis and Woodhull. Seeking to move the debate on as early as the late 1980s by providing a different perspective on why it is important to retain the sexual dimension was American legal scholar and radical feminist Catharine MacKinnon. She argued that it is not the use of violence which surrounds acts of rape (for example, the use of actual or implied force, including an object or weapon) that gives it its character. Rather, it is the heterosexual element.[56] She explained that in political, social and legal arenas, a certain level of coercion or force is anticipated, even taken for granted, as accompanying 'normal' heterosexual sex. It is acceptable for 'rough' consensual sex to occur within a male-female (as well as male-male or female-female) relationship, so long as significant physical harm amounting to grievous bodily harm does not result. The presence of either mental or physical force does not therefore automatically indicate rape.[57]

MacKinnon's case continues to be that women often find it hard to differentiate rape from everyday heterosexual sex, because they culturally assimilate the idea that experiences of rape are intrinsically similar to those of normal heterosexual intercourse.[58] The act of '[r]ape is violent insofar as it is located along a continuum of heterosexual experience, which is itself saturated by coercion and force.'[59] Her argument is that removing the sexual element of the crime 'allows one to be against it without raising any

[56] Catharine A. MacKinnon, *Towards a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989), pp.172-3; Cahill, *Rethinking Rape*, p.37.
[57] MacKinnon, *Towards a Feminist Theory of the State*, p.173.
[58] Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, (New Haven, CT: Yale University Press, 1979), pp.218-9. Lie back and think of England, the marital rape exemption etc.
[59] Henderson, 'Feminism, Foucault, and Rape', p.246.

questions about the extent to which the institution of heterosexuality has defined force as a normal part of' heterosexual relations.[60] She notes that 'rape is not less sexual' for involving violence '[t]o the extent that coercion has become integral to male sexuality, rape may even be sexual to the degree that, and because, it is violent'.[61] In the context of rape in international law, however, interventions by scholars like MacKinnon have not managed to shift the grounds for debate, partly because the issue of violence is essentially redundant alongside the issue of consent in war.

Brownmiller's work continues to be invoked within the debates. *Against Our Will* (1970) first added a further dimension to the debates and continues to be referenced along with her more recent contributions. In responding to claims, explicit and implicit, that men are at the mercy of their sexual needs and that women who provoke the sexual stimulation of men are responsible for their assault, Brownmiller provides an alternative perspective. She removes the sexual dimension to the act by arguing that rather than being motivated by sexual gratification or stimulation, rape needs to be identified as linked to the male will to dominate, possess and degrade. In other words, rape is a crime not of sexual lust, but instead arises out of a will to use violence to enforce masculine power.

Brownmiller took her point further when she challenged the tradition that the sexual element of rape needed to be understood as being part of a natural, biological system. She explained that accepting as 'natural' behaviour both aggressive sexual male behaviour and passive sexual female behaviour, makes the sexual descriptor both redundant and damaging. For her, characterising rape as a form of *sexual* violence is harmful because it fails to recognise the true nature of the harm inflicted.[62] Rape, she argues, must be understood as a deliberate, violent and hostile act of possession and

[60] MacKinnon, *Sexual Harassment of Working Women*, p.219.
[61] MacKinnon, *Towards a Feminist Theory of the State*, p.173.
[62] Brownmiller, *Against Our Will*, p.378.

degradation by men, intended to not only to intimidate and incite fear amongst women, but to deny them a full sense of personhood. Her argument remains that even in individual cases of rape, 'the meaning of rape is never individual'.[63] It is intended to work as a reminder for both the perpetrator and the victim that social membership of either one of these sexes is the defining aspect of their identity. Brownmiller's stance is therefore that rape should be described primarily as a form of violence, so that it is clearly understood as an act of aggression. As part of her argument, she also draws a correlation with male political motivations to dominate women. She insists that rape is used as a weapon in patriarchal society against women in order to control and dominate them. Brownmiller maintains that rape is 'nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.'[64]

This perspective continues to be met with criticism from others amongst her fellow feminists. Cahill, notably, argues that her 'model of rape places women strictly over and against the political and social structures that underscore the phenomenon of rape, or at the very least understands women as merely objectified by them.'[65] Ironically, in her attempt to undermine the misconception that women provoke rape, Cahill suggests that Brownmiller's argument 'paradoxically threatens the possibility of any female agency.'[66] For Cahill, another problem is that Brownmiller does not adequately take into account the complex relationship between sexuality and politics. By claiming rape is primarily about power, and therefore constitutes a political and not sexual act, she sees Brownmiller as having set up an invalid distinction between the two. For Cahill, this divergence ignores

[63] Henderson, 'Feminism, Foucault, and Rape', p.240.
[64] Brownmiller's language still implicates men as constituting the 'natural' rapists even were they may not utilise the penis to inflict the violence. Brownmiller, *Against Our Will*, p.15. Her stance remains the same, as an interview in 2018 underlines, Rachel Cooke, 'US Feminist Susan Brownmiller on Why Her Groundbreaking Book is Still Relevant', *The Guardian*, 18 February 2018: https://www.theguardian.com/world/2018/feb/18/susan-brownmiller-against-our-will-interview-metoo, (accessed 7 August 2020).
[65] Cahill, *Rethinking Rape*, p.25.
[66] Ibid.

the political dimension to the sexual, and consequently undermines the validity of Brownmiller's perspective and the scholarship which has followed on from her arguments. Cahill points to what she sees as a key criticism of the thinking building on Brownmiller's perspective, that it tends to encourage the eradication of rape as a specific legal 'category of rape in favour of including it under the definition of "assault"', putting it broadly in line with Foucauldian thought.[67] This framing has the effect of ignoring the fact that Brownmiller herself identified rape as constituting a distinct crime, one sitting between assault and robbery:[68]

> When rape is placed where it truly belongs, within the context of modern criminal violence, and not within the purview of ancient masculine codes, the crime retains its unique dimensions, falling midway between robbery and assault. It is, one act, both blow to the body and a blow to the mind, and a 'taking' of sex through the use or threat of force. Yet the differences between rape and an assault or a robbery are as distinctive as the obvious similarities.[69]

For Cahill, Brownmiller's interpretation of rape only becomes viable if it recognises that there is, above all, a sexual dimension.[70] Her point is that if rape is a weapon of patriarchy, as Brownmiller claims, 'then a law that renders such sex-specific claims inaudible will not be able to take account of that very characteristic'.[71] She concludes that we cannot have it both ways; rape is either another crime of violence, 'with no specific relation to the sexes and sexual relations,' or it is part 'of a larger system of sexual domination, in which case sex remains as a significant element'.[72] In other words, Brownmiller's approach shares the drawbacks inherent in the Foucauldian approach, because similarly, it restricts rape 'only

[67] Ibid, p.26.
[68] Ibid, p.26.
[69] Brownmiller, *Against Our Will*, p.377.
[70] Cahill, *Rethinking Rape*, p.26.
[71] Ibid, p.32.
[72] Ibid.

to a set of meanings that have currency in a masculinist field', and so being 'incapable of accurately describing' the real nature of women's experiences of rape.[73]

In this context, the historical roots of modern cultural understandings of conflict-perpetrated rape, and the language employed to emphasise the significance of hypermasculinity and gender essentialist stereotypes, can usefully be recalled. So doing does work to undermine Foucault's claim that there is a valid jurisprudential need to remove the sexual link, in that to do so removes the legal significance conveyed by classification of rape as a serious crime because of its sexual nature. It also, though, works to reveal the miscomprehension between Cahill and her adherents and those looking to Brownmiller. For the former, it simply works to entrench masculine privilege by downgrading the nature of the offence. For example, in the legend of the rape of the Sabine Women, for example, Roman men abducted and forcibly impregnated women and girls from neighbouring cities to create families of their own. This episode was later held to make a fruitful contribution to the founding mythology of Rome and a trope invoked in later exercises of conquest and colonisation.[74] In an uncomfortable modern echo of historical colonisation enterprises, wars involving conquest agendas over other ethnicities have also resorted to mass rape enterprises. In WWII, for example, the Imperial Japanese Army also prioritised male needs when it established so-called 'comfort stations' in occupied territories where local women and girls were forced to have sex with Japanese soldiers.[75] Rape camps and forced brothels were established during the Bosnian conflict, equally indicating a similar emphasis on male privilege.[76] Reports have established that,

[73] Ibid p.35.
[74] See, for example, Felicia Pratto, 'Sexual Politics: the Gender Gap in the Bedroom, the Cupboard and the Cabinet', in David Buss and Neil Malamuth (eds), *Sex, Power, Conflict: Evolutionary and Feminist Perspectives*, (Oxford: Oxford University Press, 1996), 179-230, p.207.
[75] Carmen M. Argibay, 'Sexual Slavery and the Comfort Women of World War II', *Berkeley Journal of International Law*, (2003), 21(2), 375-89.
[76] Pratto, 'Sexual Politics: the Gender Gap in the Bedroom, the Cupboard and the Cabinet', p.207.

as an ongoing phenomenon, UN peacekeepers[77] and members of (international) non-governmental organisations (I/NGO)[78] have raped civilians during deployment. What are these acts if not specifically sexual harms? These accounts cannot be seen as automatically invalidating Brownmiller's arguments about rape as a demonstration of power. She does, after all, insist that rape needs to be identified as a distinct offence, and certainly her emphasis on rape as an expression of masculine dominance fits well with the history of colonisation and conquest with its narratives of masculine power.

The lack of an easy resolution in the perspectives put forward by Cahill and Brownmiller continues over to inflect where the emphasis should be placed, especially in shaping law, when seeking to understand the relationship between hypermasculinity and the perpetration of rape. As noted earlier in this thesis, within patriarchal societies where hegemonic masculinity prevails, men are taught that masculinity is associated with a right to power.[79] Using violence to obtain or maintain the power of an individual or group within a society is considered acceptable.[80] In the context of conflict-related territories, these traditional masculine behaviours or traits are typically exaggerated.[81] Rape is often considered a natural choice of tool to dominate and exert control in war. The argument rests in whether an exclusion of the sexual component from rape prosecutions potentially allows the issues associated with a hegemonic masculinity to remain unchallenged and so,

[77] 'The same violations have occurred and continue to take place throughout Asia, the Middle East, Africa and Latin America'. These acts of abuse 'are not restricted to any form of warfare: conventional war, low intensity conflict, state-sponsored repression, and communal conflict have all employed rape as a core tool of terror-warfare. Carolyn Nordstrom, 'Rape: Politics and Theory in War and Peace', *Australian Feminist Studies*, (1996), 11(23), 147-62, p.150.
[78] Lizzie Dearden, **'**Oxfam was told of aid workers raping and sexually exploiting children in Haiti a decade ago', *Independent*, 16 February 2018: https://www.independent.co.uk/news/uk/home-news/oxfam-latest-sex-scandal-prostitution-rape-children-haiti-warned-2008-save-the-children-a8214781.html, (accessed 15 August 2019).
[79] Hannah Wright, *Masculinities, conflict and peacebuilding: Perspectives on men through a gender lens*, (London: Saferworld, 2014), pp.i; 4.
[80] Ibid, pp.i; 2; 4. That violence can be physical, mental or sexual.
[81] *Collins Dictionary*: https://www.collinsdictionary.com/dictionary/english/hypermasculine, (accessed 15 August 2019).

to continue to be embedded in social norms as inevitable practices and rituals.

Similar comments apply to male-male rape. Culturally, heterosexuality is considered integral to masculinity and a requirement of manliness.[82] Homosexuality is regarded as a challenge to traditional masculinity in many cultures to the extent that it is either illegal or considered deviant in many states.[83] Rape is often interpreted as being used as a tactic during conflict to 'homosexualise' and so demoralise the enemy.[84] The question is whether removing the sexual component to prosecutions for male-male rape could render such issues invisible, legally if not culturally.

From a conceptual perspective then, it is clear that the majority of those in the field of feminist scholarship agree that there is a sexual dimension to rape. Whether that dimension should be prioritised in defining the offence, certainly in the case of conflict-perpetrated rape, is less clear. The question remains whether understanding rape as a form of sexual violence is more of a help than a hindrance when framing rape as a crime in international law. There are clear parallels between the rape of men and the rape of women, as they are both linked to concepts of masculine power and right to dominance.[85] One

[82] Miranda Alison, 'Wartime sexual violence and women's rights', *Review of International Studies*, (2007), 33(1), 75-90, p.77.

[83] Ibid. As of 2017, 72 states prohibit homosexuality, including Uganda, Kenya and other African states as well as Indonesia and Malaysia. Pamela Duncan, 'Gay relationships are still criminalised in 72 countries, report finds', *The Guardian*, 27 July 2017: https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report, (accessed 15 August 2019).

[84] Sandesh Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', *Human Rights Quarterly*, (2005), 27(4), 1274-306, p.1293-4. In over seventy states, same-sex relations can result in imprisonment. In Iran, northern Nigeria, Somalia, Sudan, Saudi Arabia and Yemen, homosexuality is punishable by state execution. In Syria and Iraq, the death penalty is executed by non-state actors, such as the Islamic State. Although the death penalty can be handed down by the sharia courts in Afghanistan, Mauritania, Pakistan, Qatar and the UAE, there is no evidence to suggest that it has been implemented for private, consensual same-sex acts. Duncan, 'Gay relationships are still criminalised in 72 countries, report finds'. In Namibia, Jerry Ekandjo, Home Affairs Minister, urged police forces to 'eliminate' gays and lesbians 'from the face of Namibia.' Christopher Munnion, 'Namibian president orders gay purge', *The Telegraph*, 22 March 2001:
https://www.telegraph.co.uk/news/worldnews/africaandindianocean/namibia/1327519/Namibian-president-orders-gay-purge.html, (accessed 15 August 2019).

[85] Michael Scarce, *Male on Male Rape: The Hidden Toll of Stigma and Shame*, (New York, NY: Perseus Books, 1997). Sivakumaran discusses how the power model could be broadened to address other types of rape beyond the female-male paradigm. See Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', pp.1281-2.

challenge to efforts to prioritise the sexual dimension when framing a criminal charge of rape comes when considering female-perpetrated rape. This type of rape is seen as a contradiction in terms when adopting a gendered perspective, because it opens up the possibility for rape to be perpetrated both *by* and *against* either gender, undermining both the Cahill and the Brownmiller interpretations which rely on the threat of rape as a form of expression of masculine power. Equally, dropping men as victims into the existing sexual violence framework without considering the male experience in separate terms works, both practically and paradoxically, to reinforce patriarchal-based gender constructions to the disadvantage of those males.

As this latter point underlines, it is equally important to take into consideration the impact that categorising rape as a form of sexual violence has on victims. Currently, rape carries an enduring stigma. Survivors often, as a result, do not wish to be labelled as victims of *sexual* violence.[86] Yet many theorists and jurists continue to argue that, in line with the jurisprudence for all crime, it is important to recognise the specific offence that has been committed in order to launch a prosecution.[87] Acknowledging both the sexual and violent elements of the crime of rape are important considerations from a theoretical and practical point of view, the chapter moves to consider whether the term 'gender-based violence' can either provide a useful alternative to 'sexual violence' or whether these two can be used simultaneously without resulting in confusion.

[86] Cissa Wa Numbe, for example, stated that women raped in the DCR conflict wanted to decide the nature of the charges brought against their rapists. SOLON War Crimes Conference Report. The arguments in the conference against this were put very strongly, however, on the grounds that it was internationally important for the crimes against them to be unequivocally understood as rape, so that the perpetrators 'did not get away with it'. See Judith Rowbotham, Lorie Charlesworth and Michael Kandiah, 'Justice? – Whose Justice? Punishment, Mediation or Reconciliation?', *Law, Crime and History*, (2011), 2, 194-214.
[87] Terje Einarsen and Joseph Rikhof, *A Theory of Punishable Participation in Universal Crimes*, (Brussels: Torkel Opsahl Academic EPublisher, 2018), pp.208; 555.

Gender-Based Violence

Theoretically, the concept of gender-based violence usefully describes rape as a crime in international law without the pejorative associations with a gendered victim stigmatisation. It should work to capture the reality that rape is perpetrated by and against either gender because of their gender, thereby invoking the differential associated harms rape is held to have on the victim. The term can also be used to explain the ongoing impact that traditional gender constructs (including hypermasculine culture) have on conflict-perpetrated rape. The critical role that power and patriarchy plays in the framing of understandings of rape, including recognition of the physical consequences for victims (pregnancy, spread of disease etc.) is captured under this model.

The challenge remains with its current practical application. Over the years, various policies have been introduced, notably by the UN, to frame the process for addressing rape as a form of gender-based violence. The documents enshrining such policies should, in theory, provide a gender inclusive understanding of rape, among other crimes. Yet, such instruments are typically used only to describe violence perpetrated by men against women in international law.[88] As touched upon in the UN High Commissioner for Refugees (UNHCR) 2001 conference, *Inter-Agency Lessons Learned*, gender-based violence is understood as being 'predominantly men's violence towards women'.[89] The European Institute for Gender Equality states:

> 'Gender-based violence' and 'violence against women' are terms that are often used interchangeably as most gender-based violence is inflicted by men on

[88] R. Charli Carpenter, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations', *Security Dialogue*, (2006), 37(1), 83-103, p.86; 'The body of law about gender discrimination is widely understood to involve "women's issues"'. See Lucinda M. Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning', *Notre Dame Law Review*, (1989), 64(886), 886-910, p.888; Caterina E. Arrabal Ward, *Wartime Sexual Violence at the International Level: A Legal Perspective*, (Leiden, Netherlands: Brill Nihoff), p.173.

[89] UN High Commissioner for Refugees (UNHCR), *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations*, (Geneva: UNHCR, 2001), p.6.

> women and girls. However, it is important to retain the 'gender-based' aspect of the concept as this highlights the fact that violence against women is an expression of power inequalities between women and men.[90]

Various articles and bodies have since been introduced which address the need to combat gender-based violence against women. Another international intervention, the *Convention on the Elimination of Discrimination against Women* (CEDAW, 1979), describes gender-based violence as 'violence that is directed against a woman because she is a woman or that affects women disproportionately.'[91] As well as UN Security Council Resolutions (UNSCRs), similar documentation from the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women 1994,[92] the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, provide similar provisions. In contrast, male victims, to date, are explicitly mentioned in only one of the numerous UNSCRs.[93]

For scholars such as Gabrielle Ferrales and Suzy Maves McElrath, the absence of a clear definition of 'gender-based violence' from the international community has meant that rape has continued to be misinterpreted as a crime committed against women only, excluding male victims.[94] Reporting in 2014, Chloé Lewis refers to a '*repress*-entation of the "Male Victim Subject"', when arguing for the need to 'make explicit reference to men

[90] *European Institute for Gender Equality*: http://eige.europa.eu/gender-based-violence/what-is-gender-based-violence, (accessed 16 August 2019).
[91] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p.13, para 6.
[92] Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belem do Para'), 9 June 1994.
[93] UN Security Council, Security Council resolution 2106 (2013) [on sexual violence in armed conflict], 24 June 2013, S/RES/2106: https://www.refworld.org/docid/51d6b5e64.html, (accessed 29 August 2020).
[94] Gabrielle Ferrales and Suzy Maves McElrath, 'Beyond Rape: Reconceptualizing Gender-Based Violence During Warfare', in Rosemary Gartner and Bill McCarthy (eds), *The Oxford Handbook of Gender, Sex, and Crime*, (Oxford: Oxford University Press, 2014), 671-89, p.673.

and boys' within the discussions of sexual violence and victims.[95] For others influenced by Brownmiller's work, like clinician Jessica Turchik, the discussion needs to focus on the lack of gender inclusiveness in law, which they see as linked to how the concepts of gender and femininity relate to each other.[96] As noted, for example, by Lucinda Finley in 1990, the way language is used in law and wider society is flawed because it frames males as complete beings, while females are considered the 'other'. The term 'man' has been traditionally understood as the 'linguistic stand-in for "generically human"', as in mankind rather than humanity.[97] Women, instead, have been identified as being inherently dependent on and deficient to men, with different, and unequal rights. Various woman's rights bodies and experts have campaigned to address this issue of gender equality. Because of this insistence, the term 'gender' is not used neutrally. Instead, it is regularly employed as 'a shorthand for "women"' in international law.[98]

Reflecting in 2003, in the context of the former Yugoslavian and Rwandan Tribunals at work, Amani El Jack found little had changed in the use of this construct. He also found that the term 'gender' works to institutionalise women as victims, subjecting them to special considerations, identifying them as having special needs, legally and culturally.[99] It operates, in other words, to obscure 'the relevance [of gender] to *men* and to concepts of masculinity in any given context',[100] because they continue to be characterised simply as perpetrators, rather than being understood in a more complex

[95] Chloé Lewis, 'Systemic Silencing: Addressing Sexual Violence Against Men and Boys in Armed Conflict and its Aftermath', in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security*, (Basingstoke: Palgrave Macmillan, 2014) 203-23, p.204.
[96] Jessica Turchik, Claire Hebenstreit, and Stephanie Judson, 'An Examination of the Gender Inclusiveness of Current Theories of Sexual Violence in Adulthood: Recognizing Male Victims, Female Perpetrators and Same-Sex Violence', *Trauma Violence Abuse*, 17(2), (2016), 133-48.
[97] Finley, 'Breaking Women's Silence in Law', p.888.
[98] Ibid.
[99] Amani El Jack, *Gender and Armed Conflict: Overview Report*, (Brighton: BRIDGE, 2003), p.6.
[100] Susie Jacobs, Ruth Jacobson, and Jennifer Marchbank, 'Introduction: States of Conflict', in Susie Jacobs, Ruth Jacobson, and Jennifer Marchbank (eds), *States of Conflict: Gender, Violence and Resistance*, (London and New York, NY: Zed Books, 2000), 1-24, p.3, (original emphasis).

way.[101] Lewis, for example, distinguishes 'the "Male Perpetrator", the "Strategic Ally" and the elusive "Male Victim Subject"' in her critical examination of 'international materials and documentation'.[102]

Perhaps it is not the term 'gender' that poses a challenge to gender-inclusiveness. Rather the problem is that language (including supposed gender-neutral terms) is generally coded-masculine to signify the normality of human experience and reactions.[103] Where language is coded feminine, women are framed as less significant, which explains why 'gender-based' crimes are taken less seriously, as they are identified as crimes affecting mostly women.

Notwithstanding, in the context of 'even-handedness' theory,[104] this standard categorisation is of limited usefulness. Looking at the condemnation of particular governmental actions, Eric Heinze argues that since its inception, human rights law and accompanying discourse has been manipulated by some experts to condemn abuses in conspicuously arbitrary ways, 'when one internationally responsible actor is singled out for condemnation, whilst others escape censure for similar abuses.'[105] Similar claims can be made regarding the issue of rape and the recognition of men as victims.[106] Though it is true that rape is a crime largely perpetrated by men against women, it does not mean that male-male or female-perpetrated rape should be side-lined.[107] In future developments, the gender dimension will need to be further inflected to consider the impact of rape on non-

[101] El Jack, 'Gender and Armed Conflict', p.6.
[102] Lewis, 'Systemic Silencing', p.203.
[103] Sherryl Kleinman, *Opposing Ambitions: Gender and Identity in an Alternative Organization*, (Chicago, IL and London: University of Chicago Press, 1996), p.129.
[104] Eric Heinze, 'Even-handedness and the Politics of Human Rights', *Harvard Human Rights Journal*, (2008), 21, 7-46, p.7.
[105] Ibid.
[106] See for example, Cécile Allegra, 'Revealed: male rape used systematically in Libya as instrument of war', *The Guardian*, 3 November 2017: https://www.theguardian.com/world/2017/nov/03/revealed-male-used-systematically-in-libya-as-instrument-of-war, (accessed 16 August 2019); Ferrales and McElrath, 'Beyond Rape', p.673.
[107] See for example, Nordstrom, 'Rape: Politics and Theory in War and Peace', p.150.

binary groups.

Using the perspectives that arise from the work of Brownmiller in particular, these interpretations continue to pose a challenge to both Foucauldian and many feminist theoretical arguments surrounding the perceptions of rape as a crime, in both national communities and international law. An extra challenge for feminist scholars addressed in this chapter is that their arguments claim a need for a paramount principle of equality to ensure the inclusion and protection of *all* groups. As Chris Dolan points out, a serious consideration of males as victims of rape is in line with feminist principles, which emphasise 'equity, inclusion and intersectional approaches' to daily life.[108] In practice, however, numerous feminists such as Cahill and Plaza effectively disregard this principle in making their argument about the need to emphasise the greater significance of rape for women.[109] Lewis makes the point that when these feminists continue to insist on framing women as providing the main category of victims, the result is to encourage attitudes where male victims are either overlooked or have their experience absorbed into femininity when it is likened to that of female victims. This framing works to downgrade the validity of any claims they might make to be victims on their own terms. The consequence is that 'male-directed sexual violence is "neglected, under-reported and hardly addressed"' by the UN or other programmes when addressing the issues surrounding rape and sexual violence.[110]

A further feminist dimension to the debates was added in the shape of equity feminism, which sought to respond to the criticisms of figures like Dolan. Equity feminism advocates the need to establish equal legal rights in the present rather than continuing to emphasise historical inequalities between the sexes based on gender assumptions. Equity

[108] Looking at male victims of rape and sexual violence is in keeping with 'feminist principles that emphasise equity, inclusion, and intersectional approaches'. Chris Dolan, 'Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict', A briefing paper prepared for the workshop held at the Overseas Development Institute, 14 May 2014, p.9.
[109] Plaza, 'Our Costs and Their Benefits'; Cahill, *Rethinking Rape*.
[110] Lewis, 'Systemic Silencing', pp.210-1.

feminists have sought to address the challenges associated with linking the terms 'rape' and 'sexual violence' as a part of a gendered experience. Sommers, for example, builds on classical liberal philosophy, which sets her at odds with many non-equity feminists in her wish to ignore the past and start afresh. Instead, she proposes a gender-neutral conception of rape as part of a process of establishing equal legal rights. Discussing US criminal law and its approach to rape on university campuses in the 1990s for example, she argues that, from an equitable standpoint, viewing rape as:

> [A] crime of gender bias (encouraged by a patriarchy that looks with tolerance on the victimization of women) is perversely to miss its true nature. Rape is perpetuated by criminals, which is to say, it is perpetuated by people who are wont to gratify themselves in criminal ways and who care very little about the suffering they inflict on others.[111]

Sommers adds that whatever the historical reality, it is now necessary to realise that rape is no longer rooted in the economic, structural or social 'divisions that oppose men and women in a closed binary.'[112] For her, it has become 'just one variety of crime against a person, and rape of women is just one subvariety.'[113] The real issue is how to prevent or stop violence. To do this:

> [W]e must find ways to educate all of our children to regards violence with abhorrence and contempt. We must once again teach decency and considerateness. And this, too, must become clear: in any constructive agenda for the future, the gender feminist's divisive social philosophy has no place.[114]

[111] Sommers, *Who Stole Feminism?*, p.225. While this has echoes of Brownmiller's approach, it is in detail significantly different, especially as Brownmiller used history to make her points while Hoff Sommers argues for a need to exclude the historical dimension.
[112] Henderson, 'Feminism, Foucault, and Rape', p.244.
[113] Sommers, *Who Stole Feminism?*, p.226.
[114] Ibid.

The challenge her comments pose to gendered feminist approaches needs careful consideration. Sommers picks up on Foucault's arguments that it is essential to reflect more on the need to change traditional conceptualisations of power within the gender hierarchy. The question of whether this approach provides a way forward that discards the circularity of Foucault's feminist critics is not easily answered.

While Sommers's suggestions do have some value, her analysis lacks the necessary flexibility and breadth of focus to make it acceptable as a way of moving the debate forward to enable a wider consensus. In particular, her perspective is insufficiently radical because of its rejection of the part played by historical attitudes to rape. It could be said to represent more an ambition for the future than a prescription for today. Sommers was seeking to introduce a new public language which could contextualise a more equitable understanding of the issues involved in defining rape as an offence, but she has failed to convince the majority of her fellow feminist scholars on the issue. Many of these feminists have been scathing when commenting on her recommendations. Cahill, notably, dismisses her suggestions and continues to claim the importance of referencing the historical dimension when she insists that gender as a cultural reality plays an important part in the perpetration of rape by men and is no less relevant than its biological realities. Her point is that any analysis looking to forge a gender-neutral meaning of rape 'by discarding the artificial, socially imposed, gender-specific meanings' seriously underestimates the social significance of gender because of 'the various ways sex and gender are co-constituted.'[115] Cahill's stance remains that '[i]f rape is socially constructed as a gender-specific method of supporting, producing, and enforcing a gender hierarchy, then that construction will be basic and essential to…any one instance of rape.'[116] Given the evidence explored in the

[115] Cahill, *Rethinking Rape*, p.33.
[116] Ibid

previous chapter, it is difficult to combat such a conclusion. Yet simply endorsing this perspective on the debate continues the practical problem that equity feminism seeks to address, that overall, the term 'gender-based violence' encapsulates many of the same circular challenges found in the term 'sexual violence'.

Discontinuing the terms Sexual Violence and Gender-Based Violence?

In 2018, Germaine Greer caused controversy arguing that the categorisation of rape as a crime of sexual violence needs to be reconceptualised.[117] She insists that in most cases, rape should not viewed as a violent crime but be seen as a careless, insensitive and lazy act.[118] From Greer's perspective, most rapes do not involve physical injury, implicitly suggesting that any other harm to the victim is the result of a sense of personal grievance.[119] She disputes the view that rape constitutes 'one of the most violent crimes in the world' and one of the worst things (the *ne plus ultra*) that can happen to a woman.[120] Instead of viewing rape as a crime of violence, she suggests that we should regard it in most cases as 'non-consensual… that is "bad sex"', where there is no tenderness, communication or love, taking it out of the criminal category effectively, or leaving it at best as a summary offence on some grounds.[121] In cases where rape is obviously violent, she argues that longer sentences be given by the courts, but that, as a corollary, rape trials and sentences should be shorter to avoid women being humiliated for extended periods and encourage a conviction.[122]

Her focus in this media piece was on rape perpetrated in peacetime civil society

[117] Germaine Greer, *On Rape*, (London and Melbourne: Bloomsbury Publishing, 2018); Mark Brown, 'Germaine Greer calls for punishment for rape to be reduced', *The Guardian*, 30 May 2018: https://www.theguardian.com/books/2018/may/30/germaine-greer-calls-for-punishment-for-to-be-reduced, (accessed 15 August 2019).
[118] Greer, *On Rape*.
[119] Ibid.
[120] Brown, 'Germaine Greer calls for punishment for rape to be reduced'.
[121] Ibid.
[122] Ibid.

contexts, recognising that rape by strangers is significantly less common than rape perpetrated by family members, friends, colleagues or acquaintances. Greer seems to echo Foucault's point about biopower and the power the individual has to reshape identity through the potential to alter one's thoughts. She exclaims, '[y]ou might want to believe that the penis is a lethal weapon and that all women live in fear of that lethal weapon, well that's bullshit. It's not true. We don't live in terror of the penis … A man can't kill you with his penis."'[123] It represents a provocative stance, but one that has left her open to evidence-based criticism in relation, for example, to gang-rape consequences, although such instances would presumably constitute violent rape under her theorisation. Throughout Greer's subsequent book elaborating on her original media piece, her criticisms about the assumptions made by many feminists on the symbolism of rape constitute a dominant theme. Greer's comments serve to highlight how, historically, rape has been seen as a major crime because of the affront caused to men.

Her statements on the topic have been widely condemned, and their tone can be summarised in the response made by Natalie Collins to the effect that Greer's comments are harmful to women because they diminish the seriousness of rape.[124] Other critics less invested in the feminist approaches discussed here have been kinder to Greer's book.[125] Some of them have agreed that it at least makes some valuable points, promoting debate.[126] In recognising that currently, the low levels of convictions for rape trials requires a

[123] Brown, 'Germaine Greer calls for punishment for rape to be reduced'.
[124] Ceylan Yeginsu, 'Germaine Greer Stirs Furor With Call for Lighter Rape Penalty', *The New York Times*, 31 May 2018: https://www.nytimes.com/2018/05/31/world/europe/germaine-greer-rape.html, (accessed 15 August 2019).
[125] Matthew Scott, 'Germaine Greer's "On Rape" – a Review', *Quillette*, 5 November 2018: https://quillette.com/2018/11/05/germaine-greers-on-rape-a-review/, (accessed 26 August 2020).
[126] See for example, Gay Alcorn, 'Germaine Greer's On Rape: provocative, victim-shaming, compelling, ambivalent', *The Guardian*, 6 September 2018: https://www.theguardian.com/books/2018/sep/07/germaine-greers-on-provocative-victim-shaming-compelling-ambivalent, (accessed 15 August 2019); Yvonne Roberts, Afua Hirsch and Hannah Jane Parkinson, 'Reading Germaine: three generations respond to On Rape', *The Observer*, 9 September 2018: https://www.theguardian.com/books/2018/sep/09/germaine-greer-on-rape-book-three-women-respond, (accessed 15 August 2019).

revisiting of how rape is conceptualised in the domestic courts, Greer is right. However, as Brownmiller points out,[127] she fails in her goal of achieving a usable perspective through her insistence that most incidents constituting 'bad sex' rather than sexual violence.

Nevertheless, Greer does reveal the extent to which the continuing framing – by feminist thought as well as mainstream societal thinking discussed in this chapter – of women as permanent victims who must live in fear of men remains an obstacle to successful prosecutions. She underlines the extent to which women have bought into this model as part of their wider critique on the role of patriarchy in modern society. Her stance that this approach has been damaging for women, because it reinforces the idea that women are simply sexual objects, relate to the challenges raised elsewhere in this chapter. Greer claims that society wants women to believe that rape destroys them, and women have foolishly bought into this mythology.[128] Nevertheless, her argument does not provide a better resolution to the challenge of how 'to acknowledge and destabilize these defining aspects of rape, while cautioning against tendencies to essentialize rape as a static component of our social formation.'[129] In particular it takes little account of the realities of rape perpetrated in the context of armed conflict.

Recommendations

On balance, it is clear that the terms 'sexual violence' and 'gender-based violence' can both symbolise the harm associated with conflict-perpetrated rape, recognising that women are raped because they are women and men that are raped because they are men, and that rape is used as a violent weapon of power in war. The problem lies in their practical application, because these theoretical perspectives have not reflected changes in

[127] Rachel Cooke, 'US Feminist Susan Brownmiller on Why Her Groundbreaking Book is Still Relevant'.
[128] Ibid.
[129] Henderson, 'Feminism, Foucault and Rape', p.244.

entrenched cultural attitudes. These terms therefore continue to be used in ways that remain too gendered because of their deep roots in traditional understandings of rape. If these concepts are to be used effectively as part of a lexicon of rape in modern international law, existing gender constructs as well as the roles played by hegemonic masculinity and hypermasculinity must be revisited, in order to provide a more accurate and inclusive depiction of men and women as both victims and as perpetrators. Moreover, the experiences of men as well as women and the need for them both to be identified as victims and as perpetrators must be respectively recognised, not likened to, or rooted in one another.

To achieve this result, social and cultural education – something emphasised by equity feminists – is required. As a starting point, guidelines should be created which explain how rape is used primarily as a tool of power by and against either gender. This emphasis on power could potentially steer the conversation beyond the idea of women as permanent victims and men as perpetrators, and start an educative process required for a genuine cultural shift to take place.

Conclusion

The usefulness of categorising rape as a form of sexual violence has been extensively debated since the mid-twentieth century. Following Foucault's postulation that rape is no different to being punched in the noise and, as such, should be simply framed as another a type of violence, feminist scholars as varied as Cahill, MacKinnon and Plaza have sought to set the record straight. For these feminists, rape is different to other types of assault, because it is systematically used men as a tool in order to oppress and control women. The term 'sexual violence', they argue, symbolises this reality and plays an important role in framing the harm caused by men who rape women. In this context, the concept of sexual

violence does work to communicate important messages, particularly with regards to the use of rape as a weapon in war.

However, there are limitations. Though Cahill, MacKinnon and Plaza make valuable points about the significance of the term ‘sexual violence’ as part of a lexicon of conflict-perpetrated rape in modern international law, their analysis remains mostly limited to the experiences of female victims and the damage inflicted by male perpetrators. Little consideration has been given in the debates to whether this concept reflects the injury committed by female-perpetrators. Male-male rape victims are also largely overlooked or their experience is simply likened to that of female victims. Similar problems are found in the term ‘gender-based violence’. Originally coined to describe violence committed by an individual because of their gender, gender-based violence is typically used to refer to violence committed by men against women. If these terms are to continue to be used as part of a lexicon of rape in modern international law, it is vital that they are understood and applied in a way that reflects the gender-neutral definitions of rape created by the ICTY, the ICTR and the ICC.

Chapter 6

Dignity

Introduction

Chapter 5 examined the value of the terms 'sexual violence' and 'gender-based violence' as part of a lexicon of rape in modern international law. It considered whether they could be employed in ways that effectively reflect the gender-neutral definitions of rape constructed by the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017), the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) and the International Criminal Court (ICC, 2002-present). This chapter undertakes a similar exploration focusing on the concept of dignity, which to date remains undefined in international law.[1] It examines the legal and theoretical frameworks in which damage to human dignity as a criminal act has evolved and has been incorporated in practice into modern international law. Whether such understandings of dignity complement the aforementioned gender-neutral definitions of rape will be considered. This analysis will identify the usefulness of the dignity as a descriptor within the lexicon of rape in modern international law. Central to this investigation is consideration of the historical cultural contexts in which dignity as a legal concept emerged.

Between the medieval and early modern period, concepts of dignity and honour[2] were substantially entwined as a linguistic expression of the hegemonic masculine, where male responsibilities set the agenda and female inclusion was strictly in support of male

[1] Paulus Kaufmann, Hannes Kuch, Christian Neuhaeuser, and Elaine Webster (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, (New York, NY: Springer, 2011), p.121; Camilla Barker, *Dignity in International Human Rights* Law, (London: International Write for Rights Movement, 2011), p.9. At the European level, a definition has been provided in the European Union, Charter of Fundamental Rights of the European Union. Under the Charter of Fundamental Rights of the European Union, a definition of dignity was provided. Yet neither rape nor other forms of sexual violence were explicitly listed as part of that definition. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

[2] For more on the significance of honour in particular, see Chapter 2.

family members. This relationship has long presented a challenge to its employment in political and legal discourse. Examining these terms in order to consider the reasons for duelling (a quintessentially masculine event) during the Enlightenment period,[3] Immanuel Kant attempted to reconstruct 'dignity' in a way that would separate it from honour.

Kant's work has proved influential, culminating in a reconceptualisation of dignity that has spread its scope beyond a masculine elite, making part of civil and, then, human rights.[4] Between the nineteenth and the twentieth century, as human rights started to surface as a universal concept a connection was, from its inception, drawn to dignity.[5] In human rights thinking, it was held that dignity encapsulates the idea that by virtue of being human, every individual is born with the right to self-respect, self-worth, physical and psychological integrity and empowerment. A violation of human dignity is therefore held

[3] As Froissart's Chronicles underline, duelling was a judicial event, a form of trial by combat. See Howard Chickering and Thomas Seller, *The Study of Chivalry: Resources and Approaches*, (Ann Arbor, MI: University of Michigan, 1988), p.243.

[4] Elizabeth Anderson, 'Emotions in Kant's Later Moral Philosophy', in Monika Betzler (ed.), *Kant's Ethics of Virtue*, (Berlin: Deutsche Nationalbibliografie, 2008), 123-46, p.141.

[5] Post-Enlightenment, the preservation and protection of dignity has become one of the central principles of modern international law. Under the *Geneva Convention* (1949), '[o]utrages upon *personal dignity*' are prohibited. The term 'dignity' is used in the United Nations' founding Charter in 1945 (UN) and the UN-sponsored Universal Declaration of Human Rights 1948 (UDHR). Both the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR) and the *International Covenant on Civil and Political Rights 1966* (ICCPR) refer to the inherent dignity of all people. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I, 1977) prohibits violations of personal dignity. The *Vienna Declaration and Programme of Action 1993* declares that 'all human rights derive from the *dignity* and worth inherent in the human person'. *Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949*, International Committee of the Red Cross, International Humanitarian Law Databases: https://ihl-databases.icrc.org/ihl/INTRO/380, (accessed 7 September 2019), Article 3 1(c); The UN Charter states: 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. UN, Charter of the United Nations, 24 October 1945, 1 UNTS XVI; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, 16 December 1966*, UN, Treaty Series, vol. 993, p.3; UN General Assembly, *International Covenant on Civil and Political Rights, 16 December 1966*, UN, Treaty Series, vol. 999, p.171; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 75 2(b), Article 85 4(c); UN General Assembly, *Vienna Declaration and Programme of Action reaffirmed the UDHR and UN Charter. UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993*, A/CONF.157/23, (emphasis added); Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, (New York, NY: Cambridge University Press, 2015), p.43; See also Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law*, (2008), 19(4), 655-724, p.656.

to be a violation of human rights. Invoking this nexus, dignity has increasingly been used in international law to bring charges for war crimes – notably by the ICTY, the ICTR and the ICC.[6]

In the context of prosecuting conflict-perpetrated rape, this chapter questions the usefulness of this development, particularly given that while male-female rape is often prosecuted under this headline, male-male and female-perpetrated rape are routinely dismissed as constituting an outrage upon human dignity. An initial focus has to be on the complex relationship between the terms 'dignity' and 'honour' and their accompanying cultural baggage in Western thought. This chapter explores the efforts from the Enlightenment on to separate dignity from honour, examining the contribution of Kant and its subsequent development. It then explores the extent to which the two terms, dignity and honour, remain linked culturally and the consequent impact this relationship has on the categorisation of rape as a violation of human dignity in international law. Problems relating to polarising understandings of what constitutes dignity in different cultures globally will need to be considered as part of an assessment of the extent to which 'dignity' should continue to be used as part of the lexicon of rape in modern international law.[7]

[6] For a discussion regarding the increasing reference to dignity, see Ukri Soirila, 'Human Dignity and Glory – The Future of Human Rights Discourse?', *Allegra Lab*, (2014): http://allegralaboratory.net/human-dignity-and-glory-the-future-of-human-rights-discourse/, (accessed 16 August 2019).

[7] See, for example, Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective*, (Cambridge: Islamic Texts Society, 2002). See also Arvind Sharma, *Hindu Narratives on Human Rights*, (Santa Barbara, CA: Praeger, 2010), commenting on the secularism of Western thought; Mouez Khalfaoui, 'Human Dignity and the Creativeness of Muslim *Fiqh*: Reflections on Classical and Contemporary Muslim Approaches to the Challenge of Equality Between Human Beings in Rudiger Braun and Huseyin L. Cicek (eds), *New Approaches to Human Dignity in the Context of Qu'ranic Anthropology: The Quest for Human Dignity*, (Cambridge: Cambridge Scholars, 2017), 260-77; Anne Norton, *On The Muslim Question*, (Princeton, NJ: Princeton University Press, 2013).

Historical Context

Since ancient times, the terms 'dignity' and 'honour' have been substantially entangled. In Roman law, *dignitas* referred either to an individual's personal status[8] or to the authority of, and respect accorded to, certain institutions, such as the senate and, later, the emperor and the state. The term 'dignity', in other words, invoked the concept of honour.[9] Honour was accorded to someone on the basis of their individual achievements or familial status.[10] This understanding meant that appointment to public office, which provided an individual honourable status, also 'brought with it *dignitas*.'[11] The continuation of this understanding of *dignitas* is mirrored in the thirteenth century French definition of *dignité,* which referred to ideas of honour and privilege.[12]

A consultation of dictionaries and their definitions further elicits the extent to which the language of dignity has served to define the term 'honour'. The Latin *honos* referred to the concept of dignity.[13] *An Etymological Dictionary of the English Language,* describes honour as '[d]ignity; reputation; nobleness of mind; reverence'.[14] From a

[8] 'As for personal status, dignity represented the political or social rank derived primarily from holding certain public offices, as well as from general recognition of personal achievements or moral integrity.' Luís Roberto Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse', *Boston College International & Comparative Law Review*, (2012), 35(2), 331-93, p.334.

[9] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', p.656-7. The *Oxford Latin Dictionary* defines *dignitas* as the **'**worthiness or suitability for a task… visual impressiveness or the quality of being worthy (excellence)… rank office or a position conferring high rank… standing, esteem (and its enjoyment), or honour.' Oliver Sensen, *Kant on Human Dignity*, (Walter de Gruyter GmbH and Co. KG: Berlin, 2011), p.154.

[10] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', p.656-7.

[11] Ibid.

[12] *Dictionary.com*: http://www.dictionary.com/browse/dignity, (accessed 17 August 2019). *Online Etymology Dictionary*: http://www.etymonline.com/index.php?term=dignity, (accessed 17 August 2019).

[13] To see what else *honos* was used to describe, refer to *Latdict: Latin Dictionary & Grammar Resources*: http://www.latin-dictionary.net/definition/22284/honos-honoris, (accessed 17 August 2019); Glosbe: https://glosbe.com/la/en/honos, (accessed 17 August 2019).

[14] Will Grimshaw, *An Etymological Dictionary of the English Language, containing the radicals ad definitions of words derived from the Greek, Latin, and French languages and all the generally used technical and polite phrases adopted from French and Latin*, (Pennsylvania, PA: Grigg, Elliot & Co, 1848), p.125. '[F]rom Anglo-French *honour*, Old French *onor*, *honor* "honor, dignity, distinction, position; victory, triumph" (Modern French *honneur*), from Latin *honorem* (nominative *honos*, the form used by Cicero, but later *honor*) "honor, dignity, office, reputation," which is of unknown origin.' See, *Online*

historical perspective, the concepts of honour and dignity seem intrinsically linked.[15] As J. E. Lendon points out, '*[d]ignitas* extends back into the sources of *honour* to signify a claim to honour, and, like *honos,* can refer specifically to office as the source of that claim. But in its sense of "worthiness" it extends in the opposite direction to imply the attraction for favours, honours, and all good things that honour confers.'[16]

As part of the re-evaluation of the traditional bonds of deference and duty within communities, the role of dignity played an important part in philosophical debates in the Enlightenment. During this period, philosophers revisited notions of liberty, fraternity, tolerance, and government as well as the role of the church and state and the burdens these placed on society, in order to challenge those, which unfairly oppressed individuals.[17] Kant was central to this development, linking both moral duty and dignity to argue that the autonomy of the individual in making moral choices, based on rationality or reasonableness was one that had weight regardless of social hierarchy. He saw moral imperatives as tantamount to natural law, where willingness to accept objective moral principles was an end in itself, and that acceptance conferred dignity upon the individual. This claim to dignity was rooted in the free will required for submission to what he termed 'reasonable' legislation.[18] For Rachel Bayefsky, Kant defines dignity as 'the inherent worth of the human person' achieved as a result of not treating other individuals 'as mere means' but as intrinsically worthy of respect in their own right.[19] This understanding

Etymology Dictionary: http://www.etymonline.com/index.php?term=honor, (accessed 17 August 2019), (original emphasis).
[15] Daniël Johannes Louw, *Wholeness in Hope Care: On Nurturing the Beauty of the Human Soul in Spiritual Healing*, (Zurich: Deutsche Nationalbibliothek, 2015), p.445.
[16] J. E. Lendon, *Empire of Honour: The Art of Government in the Roman World*, (Oxford: Oxford University Press, 1997), p.275, (emphasis added).
[17] See for example, Milan Zafirovski, *The Enlightenment and Its Effects on Modern Society*, (Texas, TX: Springer, 2010).
[18] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, (translated, Mary Gregor and Jens Timmermann), (Cambridge: Cambridge University Press, 2011), pp.101-9.
[19] Rachel Bayefsky, 'Dignity, Honour, and Human Rights: Kant's Perspective', *Political Theory*, (2013), 41(6), 809-37, p.811.

established a complex conceptualisation arising out of the idea of the individuals as autonomous agents, capable of choosing their own destiny and deserving of respect independent of their position within the state hierarchy.[20]

The Kantian dignity model is widely held to represent a shift from the traditional understanding of dignity, which was rooted in the hierarchical concept of honour.[21] As Roger Sullivan observes:

> Kant's entire moral philosophy can be understood as a protest against distinctions based on the far less important criteria of rank, wealth, and privilege… 'Respect' is radically different from the notion of 'honour,' which rests only on societal roles and prudential distinctions.[22]

Manfred Kuehn explains that 'honourableness or Ehrbarkeit was for Kant a merely external form of morality… He realized clearly that it depended on the social order'.[23] A requirement to treat other individuals 'honourably' was rooted in knowing their place in the social hierarchy relative to your own, and not on the respective intrinsic worth of individuals. Kant therefore located personal morality and the responsibility for maintaining it in human relations in the notions of pure reason, rather than in the established expectations of a traditional code of honour.[24] However, the point can be made that for Kant, 'pure reason' means independent of any further social facts attributable to the person and not (as is often falsely thought about Kant) dependent upon the person's ability to reason.

Kant's reconceptualisation of dignity as representing the human value of an

[20] Ibid.
[21] Ibid, p.812.
[22] Roger Sullivan, *Immanuel Kant's Moral Theory*, (New York, NY and Melbourne: Cambridge University Press, 1995), p.197.
[23] Manfred Kuehn, *Kant: A Biography*, (New York, NY, Melbourne, and Cambridge: Cambridge University Press, 2001), p.281, (original emphasis).
[24] Ibid.

individual has had a continuing appeal in modern society, as part of a rejection of a traditional social status-based system. However, the extent to which Kant successfully separated dignity from patriarchal notions of honour is questionable given the gendered nature of the values in his original model. In *Observations on the Feeling of the Beautiful and Sublime*, Kant explored models of understanding and distinguished two distinct types: 'that of the fair sex' (woman), which considers the beautiful 'and that of the noble sex' (man), which is concerned with the sublime.[25] In other words, '[t]here are sciences which require a sharp mind, much reflection, and profundity. These are for the male sex. On the other hand there are sciences that require wit and a kind of feeling, and these are proper for women.'[26] Kant determined:

> Nothing of duty, nothing of compulsion, nothing of obligation! Woman is intolerant of all commands and morose constraint. They do something only because it pleases them, and the art [of moral education] consists in making only that please them which is good… I hardly believe that the fair sex is capable of principles… in place of it Providence has put in their breast kind and benevolent sensations.[27]

For Kant, woman's wisdom is not to do 'with what is rational, but with feeling.'[28] By this token, women possess rationality and the power of reasoning 'to a lesser extent' than man because they are guided by their feelings more than by rational logical thinking.[29] It is on this basis that in the *On the Old Saw: That May be Right in Theory But It Won't Work in*

[25] Kurt Mosser, 'Kant and Feminism', *Philosophy Faculty Publications*, (1999), 21, 322-53, p.324.
[26] 'The Blomberg Logic', Part I, *Lectures on Logic*, (translated, Michael Young), (New York, NY: Cambridge University Press, 1992), pp.17; 29.
[27] Immanuel Kant, *Observations on the Feeling of the Beautiful and Sublime*, (translated, John T. Goldthwait), (Berkley and Los Angeles, CA, and London: University of California Press, 2003), p.81.
[28] Sally Sedgwick, 'Can Kant's Ethics Survive the Feminist Critique?' in Robin May Schott (ed.), *Feminist Interpretations of Immanuel Kant*, (Pennsylvania, PA: Pennsylvania State University Press, 1997), 77-100, p.89.
[29] Ibid.

Practice, Kant listed not being a woman or child as a qualification for citizenship.[30]

Taking this point further in the *Metaphysical Elements of Justice,* Kant argued that '[n]atural laws of freedom'[31] and the 'equality that accords with this freedom,'[32] meant that women were not fit to vote or be active members or participants of a commonwealth.[33] He reasoned that because women depend for their 'subsistence and protection… on arrangements by others',[34] they have no claim or right, to guide or 'manage the state, to organize,' or work for or towards the introduction or creation of certain laws.[35] This point has widely been accepted as amounting to not only a denial of women's citizenship rights, but their claims to equality. As summarised by Sally Sedgwick, a woman 'has no reason ever to expect on the basis of Kantian morality equality under the law.'[36]

For Mari Mikkola, while his comments regarding women might initially seem troubling, on closer examination Kant's views are actually more complex.[37] Indeed, elsewhere in his work, Kant describes women in a different way to that outlined above:

> If one attends to the course of conversation in mixed companies consisting not merely of scholars and subtle reasoners but also of business people or women, one notices that their entertainment includes… arguing… Now, of all arguments there are none that more excite the participation of persons who are otherwise soon bored with subtle reasoning… than arguments about the *moral worth* of this or that action… Those for whom anything subtle and refined in theoretical

[30] Immanuel Kant, *On the Old Saw: That May be Right in Theory But It Won't Work in Practice*, (translated, E. B. Ashton, Introduction by George Miller), (Pennsylvania, PA: University of Pennsylvania, 1974), p.63.
[31] Sedgwick, 'Can Kant's Ethics Survive the Feminist Critique?', p.89.
[32] Immanuel Kant, *Metaphysical Elements of Justice: Second Edition, The complete text of Metaphysics of Morals, Part 1*, (translated with Introduction and Notes, John Ladd), (Indianapolis, IN: Hackett Publishing Company Inc, 1999), p.121.
[33] Ibid.
[34] Ibid, p.120.
[35] Ibid, p.121.
[36] Sedgwick, 'Can Kant's Ethics Survive the Feminist Critique?', p.89.
[37] Mari Mikkola, 'Kant On Moral Agency and Women's Nature', *Kantian Review*, (2011), 16(1), 89-111, p.89.

> questions is dry and irksome soon join in when it is a question of how to make out the moral import of a good or evil action… and to an extent one does not otherwise expect of them on any object of speculation they are precise, refined, and subtle in thinking.[38]

This passage indicates that Kant does not claim that women are always unequivocally apathetic to morality, (although he does not clearly state that 'women's moral conduct elicits esteem').[39] On this basis, Mikkola argues that it would be unwise and inaccurate to conclude that Kant saw women to be deficient in moral character in the sense outlined, 'since his remarks are not sufficiently informative.'[40]

Others are less convinced of the value of the Kantian model. Feminist critics like Sedgwick argue that Kantian theory is intrinsically gendered.[41] As Jean Grimshaw points out, Kant's 'ideal of moral worth *itself* encapsulates qualities seen as paradigmatically masculine, and excludes those seen as feminine.'[42] Women are 'imperfect members of humanity, or only imperfectly human'.[43] Only men naturally possess autonomy and so, human dignity.[44] Women, instead, have grace.[45]

By excluding women from the concept of dignity, Kant sustains the patriarchal ideology entrenched in the traditional understanding of honour, and perpetuates the

---

[38] Immanuel Kant, *Critique of Practical Reason*, (translated, Mary Gregor, Introduction by Andrews Reath, Revised Edition), (Cambridge: Cambridge University Press, 2015), p.126, (original emphasis).
[39] Mikkola, 'Kant On Moral Agency and Women's Nature', p.97.
[40] Ibid.
[41] Sedgwick, 'Can Kant's Ethics Survive the Feminist Critique?', p.89.
[42] Jean Grimshaw, *Philosophy and Feminist Thinking*, (Minneapolis, MN: University of Minnesota Press, 1986), p.45, (original emphasis).
[43] Sedgwick, 'Can Kant's Ethics Survive the Feminist Critique?', p.89; They are weak and fearful creatures, that 'cannot act autonomously or think for themselves - they need the competent guidance of men.' Pauline Kleingeld, 'The Problematic Status of Gender-Neutral Language in the History of Philosophy: The Case of Kant', *The Philosophical Forum*, (1993), 25(2), 134-50, p.137.
[44] Sedgwick, 'Can Kant's Ethics Survive the Feminist Critique?', p.89; Patrick Frierson and Paul Guyer (eds), *Kant: Observations on the Feeling of the Beautiful and Sublime and Other Writings*, (New York, NY: Cambridge University Press, 2011), p.175.
[45] Sedgwick, 'Can Kant's Ethics Survive the Feminist Critique?', p.89. Frierson and Guyer (eds), *Kant: Observations on the Feeling of the Beautiful and Sublime and Other Writings*, p.175.

relationship between these two concepts. This framing continues to have an impact on modern conceptualisations of these terms, which relate to the legal conceptualisation of women and their share of human rights in international as well as national legislation. It can be argued that the core premise Kant puts forward about what constitutes dignity can be stripped back to omit his accompanying caveats about women and their individual capacities, which can be seen as reflections of his time. That achieved, Kantian notions of dignity can be described as being free of gendered as well as of hierarchical expectations, promoting instead the value of the individual on his (or her) own terms. The problem lies, in the ways in which this framework feeds into and perpetuates the strongly polarised debates regarding dignity and its association with honour.

The debates regarding the gendered notion of the Kantian model of dignity aside, the question remains whether Kant successfully separated the concept of dignity from honour. An analysis of the cultural thinking that underpins a range of legislative systems, suggests not. As touched upon by Meir Dan-Cohen, some commentators and practitioners still use the term 'dignity' as an extension of or synonym for honour.[46] This understanding becomes apparent when consulting modern national dictionary definitions of these terms – an important exercise given that in cultural linguistics, '[d]ictionaries are considered culture mines'.[47] In English language dictionaries published in the England and the US, dignity remains synonymous with honour,[48] and vice versa.[49] The result of such research

[46] Meir Dan-Cohen, 'Introduction, Dignity and its (Dis)content', in Jeremy Waldron, *Dignity, Rank, and Rights*, (New York, NY: Oxford University Press, 2012), 3-12, p.4.
[47] Alexandra Bagasheva, 'Introduction', in Farzad Sharifian, *Advances in Cultural Linguistics*, (Singapore: Springer Nature Singapore Ltd., 2017), 189-222, p.190.
[48] The Oxford English Dictionary defines dignity as 'the state or quality of being worthy of *honour* or respect: the dignity of labour; a high rank or position; [a] sense of pride in oneself; self-respect'. *Lexico*: https://en.oxforddictionaries.com/definition/dignity, (accessed 17 August 2019), (emphasis added). The Collins English Dictionary published in the US defines dignity as 'the quality of being worthy of esteem or *honor*; worthiness; high repute; *honor*; the degree of worth, repute, or *honor*'. *Collins Dictionary*: https://www.collinsdictionary.com/dictionary/english/dignity, (accessed 17 August 2019), (emphasis added).
[49] In English language dictionaries published in the US, 'honor' refers to the 'high rank or position; distinction; *dignity*'. *Collins Dictionary*: https://www.collinsdictionary.com/dictionary/english/honor,

is that the usefulness of categorising rape as an outrage on human dignity under international law is left open to question.

Rape in International Law: From a Violation of Family Honour to an Outrage of Human Dignity

The exploration of dictionary definitions reveals therefore that the association made during the twentieth century between human rights and a Kantian understanding of the term 'dignity' is not as straightforward as it seems on the surface. Instead, it is complicated by the ways that the linkage brings together conflicting cultural traditions without any recognition of the problems this causes, most particularly when seeking to categorise conflict-perpetrated rape as an outrage on human dignity. The complication arises because, historically, international law emerged from a cultural context in which rape was, in line with hegemonic masculine thinking, initially framed as a violation of family or female honour. Aspects of this legal customary norm continued to manifest itself in international law as it developed during the eighteenth century.[50] This continuation encouraged the

(accessed 17 August 2019), (emphasis added). In the Collins English Dictionary published in England, dignity is listed as a synonym for honour. *Collins Dictionary*: https://www.collinsdictionary.com/dictionary/english-thesaurus/honour, (accessed 17 August 2019).

[50] For example, the Project of an International Declaration concerning the Laws and Customs of War 1874 states that '[f]amily *honour* and rights… must be respected'. Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, Article XXXVIII, (emphasis added). The *Oxford Manual on the Laws and Customs of War on Land* 1880 established that '[f]amily honour and rights…must be respected.' The Oxford Manual on the Laws and Customs of War on Land, (Institute of International Law, 1880), (emphasis added), Article 49. The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land 1907, stipulated that, 'family *honor* and rights, the lives of persons… must be respected.' Article 46, (emphasis added). Rape was explicitly referred to for the first time in the Geneva Conventions 1949, but continued to be referred to as a violation of honour: 'Women shall be protected against any *attack on their honour*, in particular against rape, enforced prostitution, or any form of indecent assault.' Geneva Convention 1949, Article 27, (emphasis added). For further information, see Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, Future*, (Lieden: Martinus Nijhoff Publishers, 2009), p.70; Catherine N. Niarchos, 'Women, War, and Rape: Challenges Facing The International Tribunal for the Former Yugoslavia', *Human Rights Quarterly*, (1995), 17(4), 649-90, p.673-5; Christine Chinkin, 'Gender and Armed Conflict', in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, (Oxford: Oxford University Press, 2014), 675-99, pp.682-3.

incorporation of a traditional gender dimension into an understanding of dignity even while the class dimension was rejected, because the concept of honour was still understood as being essentially masculine and so 'something lent to women by men'.[51] In detail, dignity as honour for women maintained its link with a woman's visible possession of purity[52] and chastity.[53] This framework meant that where a woman had been raped, she was considered to have lost honour by being soiled and so disgraced.[54] The victim – rather than the assigned masculine protector – could also be held culpable for the crime where circumstances permitted an interpretation that she had wilfully made herself vulnerable to attack. In this context, moral injury, in the sense of the 'damage done to one's conscience or moral compass', was seen as a failure on the part of the victim to 'prevent acts that transgress their own moral and ethical values or codes of conduct.'[55] Sufferers from moral injury included those who bore the responsibility for their attack because they had supposedly made themselves vulnerable to the assault.[56] Women could be privileged persons deserving of special shielding measures only because of their subordinate social

[51] UN Division for the Advancement of Women Department of Economic and Social Affairs, *Sexual Violence and Armed Conflict: UN Response*, (1998): https://www.unwomen.org/en/digital-library/publications/1998/4/women2000-sexual-violence-and-armed-conflict-united-nations-response, (accessed 7 September 2019).

[52] *Online Etymology Dictionary*: http://www.etymonline.com/index.php?term=honor, (accessed 16 August 2019).

[53] Ibid. Catherine N. Niarchos reflects that the term 'honour' has different meanings: 'dignity, esteem, allegiance to the good or the right, but concerning women it means chastity, purity, and good name.' It was these interests which the Geneva Convention (amongst other articles) sought to protect. Niarchos, 'Women, War, and Rape', p.674. By the early modern period, this understanding was well established in European thought, as the literary culture of the day underlines. In Thomas Middleton's *Changeling* (1622), based on a popular Italian tale of revenge and tragedy, when Beatrice-Joanna confessed her infidelity she did so in the following terms: 'Mine honour fell with him'. De Flores boasted that he had obtained 'her honour's prize' in the shape of her maidenhead. For further details, see Gordon Williams, *A Dictionary of Sexual Language and Imagery in Shakespearean and Stuart Literature: Volume I A-F*, (London and Atlantic Highlands, NJ: The Athlone Press, 1994), p.676.

[54] Niarchos, 'Women, War, and Rape', p.674.

[55] 'What is moral injury?', Syracuse University, Moral Injury Project: http://moralinjuryproject.syr.edu/about-moral-injury/, (accessed 16 August 2019). See Appendix 4.

[56] Rhonda Copelon, 'Rape and Gender Violence: From Impunity to Accountability in International Law', *Carnagie Council for Ethics in International Affairs*, 5 November 2013: http://www.carnegiecouncil.org/publications/archive/dialogue/2_10/articles/1052.html, (accessed 5 September 2019).

status. Such language reinforces ideas of the importance of 'male entitlement and female chastity',[57] where a woman's family honour was lost because of her own misconduct.[58] The legacy of this interpretation of rape and its aftermath lingers on, as noted in previous chapters.

Unsurprisingly, a continued framing of rape as a violation of family or female honour has been contested by feminist scholars. For Rhonda Copelon, to imply that the woman's honour is lost following rape is tantamount to blaming the victim for the crime.[59] This understanding negatively affects both the social and familial position of the woman because it reinforces the stigma attached to the offence.[60] Another critic, Alona Hagay-Frey, suggests that an invocation of the concept of honour not only diminishes the gravity of the injury caused by rape, but conceals the individual physical, social and personal harm caused to the victim.[61] Where rape is framed as a violation of honour, the focus is on the damage done to family honour, not the individual.[62] Perpetuation of this understanding of rape reinforces hegemonic masculine thinking, including the idea of the woman as a man's property.[63] The language of honour ignores the violent nature of the crime and the impact on the victim.[64] It normalises and renders invisible issues such as women's subordination to men, as well as man's supremacy.[65] A further challenge is that, historically, rape was

[57] Copelon, 'Rape and Gender Violence'.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Alona Hagay-Frey, 'Sex and Gender Crimes in International Law', in Klaus Hoffmann-Holland (ed.), *Ethics and Human Rights in a Globalized World: An Interdisciplinary and International Approach,* (Mohr Siebeck: Tübingen, 2009), 179-208, p.190; Hagay-Frey, *Sex and Gender Crimes in the New International Law*, p.71. Niarchos observes that by using the language of honour, '[t]he woman's true injury' is evaded. Instead, 'rape begins to look like seduction with "just a little persuading" rather than a massive and brutal assault on the body and psyche.' Niarchos, 'Women, War, and Rape', p.674.
[62] Hagay-Frey, 'Sex and Gender Crimes in International Law', p.190.
[63] Ibid.
[64] Ibid.
[65] Ibid.

understood solely as a crime perpetrated by men against women. This understanding has left a legacy in cultural attitudes contributing to incidents of male-male and female-perpetrated rape being overlooked.[66] Indeed, the categorisation of rape as a violation of family or female honour undoubtedly had implications for its prosecution in the post-WWII war crimes trials of the International Military Tribunal at Nuremberg (IMT, 1945-1946) and the International Military Tribunal for the Far East (IMTFE, 1946-1947).[67] As touched upon by Catherine Niarchos, labelling rape as a violation of honour has the power to make it appear less deserving of prosecution than other injuries, such as limb or sight loss.[68]

Though rape is no longer explicitly framed as a violation of family or female honour in modern international law, its categorisation as an outrage upon human dignity has, seemingly, continued this understanding, as indicated in the work of the ICTY. During the *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (2001) trial, for example, Article 27 of Geneva Convention IV was referred to, which stipulates that all women shall be 'especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.'[69] Attempting to explain what was meant by honour, the Trial Chamber stated in a footnote that it interpreted '"honour" in the sense of "dignity"'.[70] This understanding was not to detract from the 'view that these are violent crimes.'[71]

[66] See for example, Augusta DelZotto and Adam Jones, 'Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?', unpublished paper presented to the Annual Convention of the International Studies Association, New Orleans, LA, 23-27 March 2002: http://adamjones.freeservers.com/malerape.htm, (accessed 24 August 2019).
[67] Hagay-Frey, 'Sex and Gender Crimes in International Law', p.190.
[68] Niarchos, 'Women, War, and Rape', p.674.
[69] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001, para 531.
[70] Ibid, fn.1299.
[71] Ibid.

This circular understanding is apparent in the *Prosecutor v. Anto Furundžija* trial judgment. Clarifying the seriousness of crimes against human or personal dignity in international law, the Trial Chamber stated:

> The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or humiliating and debasing the *honour*, the self-respect or the mental well-being of a person.[72]

By failing to provide any further clarification, the Trial Chamber appears to have reinforced the notion that these concepts are intrinsically linked in international law, which has wider implications for the prosecution of rape. It is worth reiterating the point made in Chapter 4 that male-male rape, for example, was routinely ignored under this heading by the specialist international courts.

The linguistic challenges associated with the term 'dignity' are not limited to its relationship to the concept of honour. Indeed, the term 'dignity' does not exist as an independent concept in some languages. For example, in Hindi, there is no equivalent to the term 'dignity'. Barker writes that if the term was to be translated it would have to be replaced with the language of 'worth', 'honour' or 'self-respect', something which fundamentally changes the understanding of Indian law and its utilisation of these terms.[73] This point leads us to consider the impact of cultural relativism on international law.

[72] *Prosecutor v. Anto Furundžija (Trial Judgment)*, IT-95-17/1-T, ICTY, 10 December 1998, para 183, (emphasis added).
[73] Barker, *Dignity in International Human Rights* Law, p.10.

Cultural Relativism

A key issue within the development of international law is cultural relativism, '[t]he position that there is no universal standard to measure cultures by, and that all cultures are equally valid and must be understood in their own terms.'[74] In this context, the concept of dignity has provoked much discussion.

In the West, the concept of dignity is currently employed in legal language alongside that of equality to promote and protect women's parity of access to human rights. This understanding is illustrated in the UN's adoption of the *Convention on the Elimination of all Forms of Discrimination Against Women 1979* (CEDAW),[75] which prohibits discriminatory acts against women. The Convention aims to protect women against rape and supports prosecutions of alleged perpetrators. CEDAW acknowledges, for example, that 'extensive discrimination against women continues to exist'.[76] It asserts that acts of discrimination violate 'the principles of equality of rights and respect for *human dignity*'.[77]

In order to monitor compliance, the UN introduced the CEDAW Committee (1982-present) – a body consisting of 23 women's rights experts, which is responsible for assessing whether the Convention has been implemented by State parties and providing recommendations for improvement where permitted.[78] Since its creation, states have challenged the universal applicability of CEDAW. In 2008, for example, several Member

[74] Oxford Reference: https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095652905, (accessed 17 August 2020).
[75] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979*, UN, Treaty Series, vol. 1249, p.13. As of 2019, 185 states have become party to the Convention.
[76] Ibid, p.1.
[77] Ibid, (emphasis added).
[78] For further information regarding CEDAW, see Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law*, (Cambridge and New York, NY: Cambridge University Press, 2013).

States submitted Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women,[79] on the basis that CEDAW's secularised terminology undermines aspects of their domestic laws, which aim to protect the rights and dignity of women differently.[80] From the perspective of many Islamic states, women's right to the possession of individual dignity needs to be included within the broader conceptualisation of the family and how that operates. King Abdullah bin Abdul Aziz of Saudi Arabia (2005-2015), argues that '[i]t is absurd to impose on an individual or a society rights that are alien to its beliefs or principles'.[81]

Taking this point further in its reservations regarding Article 16 (see Appendix 3),[82] Egypt maintains that in Sharia law, women's marital rights are adequately protected; it accords women with rights 'equivalent to those of their spouses so as to ensure a just balance between them'.[83] The best guarantees of 'true equality' between spouses, Egypt argues, lies in acknowledging equivalency which ensures complementarity, rather than 'a

[79] UN CEDAW, Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/SP/2008/2, 19 May 2008. In the context of CEDAW, '[a] reservation is any statement made when ratifying a treaty that "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State"'. Linda M. Keller, 'The Impact of States Parties' Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', *Michigan State Law Review*, (2014), 309-26, pp.310-1.

[80] Neshmiya Adnan Khan, 'Women's Rights in Islam and Reservations to Convention on the Elimination of All Forms of Discrimination Against Women', *Courting the Law*, 18 February 2016: http://courtingthelaw.com/2016/02/18/commentary/womens-rights-in-islam-and-reservations-to-convention-on-the-elimination-of-all-forms-of-discrimination-against-women/, (accessed 24 August 2019). See also J. Bauer and D. Bell (eds), *The East Asian Challenge for Human Rights*, (Cambridge: Cambridge University Press, 1999); Shaheen Sardar Ali, *Conceptualising Islamic Law. CEDAW and Women's Human Rights in Plural Legal Settings; A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan* (New Delhi; UNIFEM, 2006).

[81] Barker, *Dignity in International Human Rights Law*, p.11

[82] UN CEDAW, Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, p.11.

[83] Ibid; Jane Connors, 'Article 28', in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, (Oxford: Oxford University Press, 2012), 564-96, p.574.

quasi-equality that renders the marriage a burden on the wife'.[84] Egypt insists that balance is achieved because in Sharia law the husband is required to provide financial support, even in the event of divorce.[85] The wife, on the other hand, retains full property rights and is not obliged to support, maintain or provide for either herself or her husband.[86]

The reservations submitted by Morocco make similar charges, stipulating that equality of the kind espoused by CEDAW is 'considered incompatible with the Islamic sharia, which guarantees to each of the spouses the rights and responsibilities within a framework of equilibrium and complementarity in order to preserve the sacred bond of matrimony.'[87] Iraq also insists in its reservations about CEDAW that Sharia law works to secure 'women rights equivalent to the rights of their spouses so as to ensure a just balance between them'.[88] As part of its ideology of 'equal but different', the point is made that there is a balance of advantages possessed by each sex. Yet as supporters of CEDAW point out, Sharia law in its various manifestations does restrict 'the wife's rights to divorce by making this contingent on a judge's ruling, a restriction which does not apply to the husband'.[89] Moreover, many Islamic states continue to reject marital rape as a viable legal concept. Under its most recent revision of the penal code, Egypt continues to overlook rape within marriage, denying the personal dimension to forced intercourse.

Neshmiya Adnan Khan argues that these reservations should not be viewed as either a rejection of women's rights or a violation of their dignity. These states, she maintains, are simply seeking to pronounce these rights within an Islamic framework,

[84] Ibid.
[85] Ibid.
[86] Ibid. For comments, see Connors, 'Article 28', pp.573-4; Khan, 'Women's Rights in Islam and Reservations to Convention on the Elimination of All Forms of Discrimination Against Women'.
[87] UN CEDAW, Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women, p.22.
[88] Ibid, p14.
[89] Ibid, p.11; Connors, 'Article 28', p.574.

which requires that the biological differences between the two are recognised on an equitable, but not equal (in the sense of the same) basis.[90] It needs to be understood, she insists, that the women as well as men in these states 'derive their identity from their cultures and traditions', which include their religious beliefs, and that 'any attack on their culture, is an attack on their identity.'[91] For women brought up with these religious and cultural values, 'their honour also forms part of their identity'.[92] As such, their dignity is best served by preserving that identity rather than having the 'ability to exercise their rights.'[93]

Taking a practical perspective on the arguments presented by those Islamic states, Radhika Coomaraswamy, former Special Rapporteur on Violence against Women (1994-2003), acknowledges that the global situation is more complex than is recognised by CEDAW and its supporters. In the wider context of non-Western societies, the women of these nations predominantly 'identify with their culture' and feel insulted rather than protected by outsiders who condemn their approach to doing things.[94] Coomaraswamy insists that '[s]ince their sense of identity is integrally linked to the general attitude towards their community, their sense of dignity and self-respect often comes from members of the larger community.'[95]

Coomaraswamy produces no sociological evidence to support her claim. On those grounds, her conclusions can be described as being less than robust. That said, there is

[90] Khan, 'Women's Rights in Islam and Reservations to Convention on the Elimination of All Forms of Discrimination Against Women'.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women*, 31 January 2002, E/CN.4/2002/83, para 5.
[95] Ibid.

validity to some of the points she raises about identity and the imposition of Western values on non-Western societies. This view is reflected in the reactions of some Western feminist commentators to these charges of what might be called 'conceptual imperialism'. Camilla Barker, for example, agrees that those individuals or groups that feel that their beliefs and culture are under scrutiny or attack are likely to react by rejecting the proposed provision of protection, by distancing themselves from those offering the provision.[96]

Both Western feminist critics of Islamic states and pragmatists like Coomaraswamy and Barker who seek reconciliation between the sides insist that a patriarchal understanding of Islam is entrenched in Sharia law. For Khan, for example, any implementation of domestic law, which remains 'conditional upon the complete subjugation of the wife to her husband' is unacceptable.[97] The gulf manifested by these divergent stances suggests that cultural relativism still poses an obstacle to the evolution and application of a mutually agreed definition of dignity in international law. This reality in itself provides a test of the potential usefulness of dignity as a part of a lexicon of rape in international law.

There are potential ways of navigating around these problems. Here, the engagement with and response to cultural relativism debates within Africa provides a useful example. Various experts have written on the subject in reaction to concerns raised regarding practices such as female genital cutting and forced marriage.[98] In response,

[96] Barker, *Dignity in International Human Rights* Law, p.11.
[97] Khan, 'Women's Rights in Islam and Reservations to Convention on the Elimination of All Forms of Discrimination Against Women'.
[98] Cultural relativism and women's rights within Africa has been extensively examined. See for example, Norah Hashim Msuya, 'Concept of Culture Relativism and Women's Rights in Sub-Saharan Africa', *Journal of Asian and African Studies*, (2019), 54(8), 1145-58; Foluke Ifejola Adebisi, 'Where the Rubber Hits the Road: The Limitations of the Universalism vs Cultural Relativism Debate Impacting FGM Control in Nigeria', *NIALS Journal of Law and Gender*, (2015); Adebola O. Olaborede and Nasila S. Rembe, 'Reflections on the Debate Between Universality of Human Rights and Cultural Relativism in the Context of Child Marriage in Africa', *Speculum Juris*, (2018), 32(2), 94-105.

Africa has created tools like the Protocol to the African Union Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol, 2003), which set up the parameters of human rights law in a way that engages with their own culture as well as international standards on women's rights.[99] In the context of establishing a specialist international court like the Rwandan Tribunal, then, it can use its own human rights tools to set the parameters for how to navigate the problems addressed in this chapter. Even so, this does not fully resolve the challenge of the use of dignity as a framing term for prosecutions for rape in international law because the linguistic and cultural tensions over what is conveyed by dignity remain unaddressed.

Recommendations

In 1998, at a time when both the ICTY or the ICTR were developing their prosecution protocols, a UN report had warned that both the terms 'dignity' and 'honour' in international law have damaging connotations for women. It concluded that these concepts are:

> [L]ent to women by men, and that a raped woman is thereby dishonoured. Failure of these instruments to categorize sexual violence as a violent crime that violates bodily integrity, presents a serious obstacle to addressing crimes of sexual violence against women. It directly reflects and reinforces the trivialization of such offences.[100]

Emphasising this point, Valerie Oosterveld argues that listing rape as an outrage upon

[99] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003: https://www.refworld.org/docid/3f4b139d4.html, (accessed 17 July 2020). See specifically Article 5.

[100] *Violence and Armed Conflict: United Nations Response*, (UN Division for the Advancement of Women Department of Economic and Social Affairs: 1998), referenced in Sandra Whitworth, *Men, Militarism and UN Peacekeeping: A Gendered Analysis* (Boulder, CO: Lynne Rienner Publishers, 2004), p.125.

either human or personal dignity represents a backward step rather than an advance.[101] It sends an out-of-date and damaging message that these crimes should be assessed based on the injury done to the victim's modesty, chastity or honour.[102] Kelly Dawn Askin concurs, having found that such a delineation of rape as violation of human dignity or a crime against honour grossly miscategorises the crime and entrenches harmful stereotypes.[103]

Even experts who identify honour and dignity as separate concepts accept that, quite independently of the challenges of cultural relativism, the language of dignity is failing to capture the harm caused by rape. For Copelon:

> [W]hile the concept of dignity potentially embraces more profound concerns [than honour], standing alone it obfuscates the fact that rape is fundamentally violence against women – violence against a woman's body, autonomy, integrity, self-hood, security and self-esteem as well as her standing in the community. This failure to recognize rape as violence is critical to the traditionally lesser or ambiguous status of rape.[104]

Other scholars question the usefulness of applying a single term like 'dignity' to categorise a criminal act, because of differences in understanding and perception of language. Ruth Macklin, for example, suggests that calls for dignity are either restatements of other ideas or slogans that add nothing of value to the topic.[105] Mirko Bagaric and James Allan argue that as philosophical or legal concept, dignity is incapable of justifying or explaining 'any

[101] Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law', *Michigan Journal of International Law*, (2004), 25, 605-51, pp.612-3.
[102] Ibid, p.613.
[103] Kelly Dawn Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkley Journal of International Law*, (2003), 21(2), 288-329, p.304.
[104] Rhonda Copelon, 'Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War', in Catherine Besteman (ed.), *Violence: A Reader*, (New York, NY: New York University Press, 2002), 193-210, p.196.
[105] Ruth Macklin, 'Dignity is a useless concept: It means no more than respect for persons or their autonomy', *BMJ*, (2003), 327(7429), 1419-20.

narrower interests; it cannot do the work [that] nonconsequentialist rights adherents demand of it'.[106] It is on this basis that the conclusion is reached that the term 'dignity' should not be included in the lexicon of rape in modern international law.

Conclusion

The use of dignity as a legal concept in modern international law continues to polarise experts in ways that highlight the need to work out solutions that recognise the challenge provided by cultural relativism. Catherine Dupré, for example, argues that the dignity is a useful concept that embodies notions such as human worth, equality and freedom.[107] Mohammad Hashim Kamali, on the other hand, fairly identifies problems relating to the practical application of the term, including different understandings of what constitutes 'dignity'.[108] Additional challenges are raised in societies where the term does not exist.

However, when applied in cases of rape in modern international law, as this chapter underlines, dignity reveals itself as providing a flawed approach in that it raises as many (if different) problems as it solves. Etymologically, the origins of the term are deeply entrenched in patriarchal conceptualisations of honour in a wide range of cultures. Since the Enlightenment period, philosophers, notably Kant, have attempted to reconceptualise dignity, and separate it from traditional notions of honour; yet they continue to be interlinked in practice. This ongoing relationship presents a number of challenges for the categorisation of rape as a violation of human dignity in international law. In both national and international legal systems, the term 'dignity' works to reinforce the traditional

[106] Mirko Bagaric and James Allan, 'The Vacuous Concept of Dignity', *Journal of Human Rights*, (2006), 5(2), 257-70, pp.257; 260.
[107] Catherine Dupré, 'What does dignity mean in a legal context', *The Guardian*, 24 March 2011: https://www.theguardian.com/commentisfree/libertycentral/2011/mar/24/dignity-uk-europe-human-rights, (accessed 16 August 2019).
[108] See, for example, Kamali, *The Dignity of Man*. See also Arvind Sharma, *Hindu Narratives on Human Rights*, (Santa Barbara, CA: Praeger, 2010), commenting on the secularism of Western thought.

understanding of rape simply as a defilement of a woman's chastity and man's property, ignoring the violent nature of the crime. It also overlooks instances of male-male and female-perpetrated rape. Indeed, the ICTY nor the ICTR routinely overlooked male-male or female-perpetrated rape under this heading. On this basis, this chapter concludes that dignity cannot usefully be employed in the lexicon of rape for use in modern international specialist courts. This conclusion leaves open the consideration of the categorisation of rape as an act of torture in modern international law, which will be explored in the next chapter.

Chapter 7

Torture

Introduction

The previous chapter reviewed and rejected the value of characterising rape as an outrage upon human dignity for inclusion in the lexicon of rape in modern international law. Attention now turns to the usefulness of classifying rape as a crime of torture, which shifts the focus of the argument onto the public/private dichotomy in international law. Here, an examination is undertaken of whether such a categorisation can provide a constructive alternative, avoiding a perpetuation of those pejorative cultural and gendered overtones traditionally associated with victims of conflict-related rape.

In seeking to clarify what constitutes torture and other acts of ill-treatment, the UN General Assembly (1945-present) created the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (UNCAT, 1984),[1] which defined torture as a breach of human rights in broad terms. Though not explicitly listed in the Convention, rape was later identified in international law as 'gross, flagrant or mass violations of human rights' which can cause severe physical and mental pain or suffering when inflicted by individuals acting in some way as a state actor or in an official capacity.[2]

On the one hand, this identification has the capacity to conceptualise conflict-perpetrated rape as being politically motivated or sponsored. An act of rape therefore has the potential to relate to the inherently public sphere of international law, rather than constituting an escalation of an essentially private harm, which is the outcome of a purely individual or personal choice or reaction. On the other, there are practical problems

[1] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UN, Treaty Series, vol.1465, p.85.
[2] Ibid, Articles 1 and 3.

regarding the use of torture in applications by modern international criminal tribunals and courts. For example, when negotiating the relevant boundaries between the public and the private sphere, and deciding how to conceptualise the nature of a crime involving rape, these bodies have relied on pre-existing cultural bias and experience. Such bias can lead to a presumption that rape should be categorised as a private harm, rather than as a reflection of state policy, especially where incidents of rape seem to embody (hetero)normative understandings of the crime. For example, in the proceedings of the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017) and the International Criminal Tribunal for Rwanda (ICTR, 1994-2014), male-female rape was rarely labelled as torture. This infrequency could be linked to its identification as a (hetero)normative private harm.[3] Even where, in some instances, torture was invoked in the charge, the categorisation was inconsistent. Sometimes rape and torture were prosecuted as separate offences. At other times, rape was prosecuted as torture only. This might suggest that cultural relativism is also a factor to be considered. For Maila Stivens, for example, the boundaries of that dichotomy between the public and the private differs widely across different cultures and societies, but its manifestation in international law invokes Western standards.[4]

One constant, however, has been the continuing focus in the debates on the sexual

[3] Amrita Kapur and Kelli Muddell, *When No One Calls it Rape: Addressing Sexual Violence Against Men and Boys*, (New York, NY: International Center for Justice, 2016): https://www.ictj.org/sites/default/files/ICTJ_Report_SexualViolenceMen_2016.pdf, (accessed 8 September 2019), p.16; See also Sandesh Sivakumaran, who sates that male-male rape is regularly characterised as torture by the international courts, non-governmental and intergovernmental organisations, because of 'the view that men cannot be subjected to sexual assault.' This issue is 'almost the reverse of the situation concerning the women's movement, which wanted, for example, rape to be recognized as torture.' Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', *European Journal of International Law*, (2007), 18(2), 253-76, p.256.

[4] Maila Stivens, 'Theorising gender, power and modernity in affluent Asia', in Krishna Sen and Maila Stivens (eds), *Gender and Power in Affluent Asia*, (London: Routledge, 1988) 1-34, p.4; Hilary Charlesworth, 'What are "Women's International Human Rights"?', in Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives*, (Philadelphia, PA: University of Pennsylvania Press, 1994), 58-84, p.69.

element of the crime. In contrast, where male-male rape was prosecuted as torture, for example, little mention was made of the sexual dimension to the crime, suggesting its identification as both non-normative and a public harm.[5] Though it can readily be identified as non-normative, female-perpetrated rape (committed against either sex) has yet to be prosecuted as torture.[6] The implications of these inconsistencies for a culturally powerful and persistent continuation of traditional gender essentialist thinking regarding rape are considerable.

To contextualise the relationship between gender essentialist thinking and the public/private dichotomy in international law, and the impact this nexus has on rape prosecutions, it is important to consider the role played by hypermasculinity and hegemonic masculinity. As part of this exercise, the historical realities associated with the prohibition of torture in international law and its accompanying cultural baggage will be examined, in order to determine the usefulness of this categorisation within a lexicon of rape in modern international law.

Historical Context

Historically, torture was considered both an acceptable form of criminal punishment and an effective method of interrogation for those considered threats to state security in various countries.[7] During Antiquity, for example, the ancient Greeks and Romans routinely tortured slaves to ensure their testimony was reliable.[8] Torture played an important role in

[5] The ICTR has never prosecuted male-male rape and sexual violence. Anjali Manivannan, 'Seeking Justice for Male Victims of Sexual Violence in Armed Conflict', *International Law and Politics*, (2014), 46(635), 635-79, p.661. See also Kapur and Kelli Muddell, *When No One Calls it Rape*, pp.2; 11; 14-7.
[6] It could be suggested that this represents an unwillingness to recognise women as intrinsically representative of state power.
[7] Deborah Blatt, 'Recognizing Rape as a Method of Torture', *Review of Law and Social Change*, (1992), 19(821), 821-65, pp.823-4.
[8] In ancient Greece, 'although torture for the purpose of obtaining testimony or confession was never applied to free citizens, it was used as a means of punishment applicable to all classes. Aristophanes alludes to the wheel being frequently employed for this propose.' Likewise, in ancient Rome, 'the free-man

the trial proceedings of medieval Europe.[9] It was used as a legitimate form of either criminal punishment or method of state-endorsed interrogation. As the latter, its use by armed forces and other related bodies acting on behalf of the state was intended to enable the state to defend itself against threats to its security, a position reflected in state actions throughout the world in previous centuries.[10] Torture was used in a similar way in ancient China, as a lawful method of extracting a confession.[11] In the eighteenth century, attitudes towards the use of torture started to change. Enlightenment theorists had expressed concern regarding its uncivilised nature. Questions were raised about the usefulness of testimony produced by such measures.[12] Italian philosopher and jurist Cesare Bonesana di Beccaria in his treatise *On Crimes and Punishments* (1764), for example, condemned torture.[13] By 1800, use of all methods of torture had been officially abolished in Western Europe and the US, diminishing its association with legitimate political strategies.[14]

As part of the emergence of international humanitarian law in the nineteenth century, recorded uses of torture in conflict-related environments started to decline. Various legal instruments that sought to regulate the conduct of war were introduced,

---

was not, in any ordinary circumstances, liable to torture as a means of extorting confession. The exception to this rule was in the case of anyone accused of treason.' George Ryley Scott, *The History of Torture Throughout the Ages*, (New York, NY and Oxon: Routledge, 2003), p.44. Matthew Lippman, 'The Development and Drafting of the UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment', *Boston College International and Competitive Law Review*, (1994), 17(2), 275-335, pp.275-6; Lisa Hajjar, *Torture: A Sociology of Violence and Human Rights*, (Abingdon: Routledge, 2013), p.16; Page duBois, *Torture and Truth*, (Oxon: Routledge, 1991), p.4.

[9] See John Langbein, *Torture and the Law of Proof*, (Chicago, IL and London: University of Chicago Press, 2012); Steven Currie, *Medieval Punishment and Torture*, (San Diego, CA: ReferencePoint Press, 2014); Hajjar, *Torture: A Sociology of Violence and Human Rights*, pp.16-7.

[10] Blatt, 'Recognizing Rape as a Method of Torture', pp.823-4.

[11] '[A]lthough mainstream political philosophers like Confucianists had always advocated benevolence and cautiousness in the application of criminal punishment.' Xia Yong, *The Philosophy of Civil Rights in the Context of China*, (Leiden: Martinus Nijhoff Publishers, 2011), p.343.

[12] Michael Peel, 'Introduction', in Michael Peel (ed.), *Rape as a Method of Torture*, (London: Medical Foundation for the care of victims of torture, 2001), 7-,20, p.11; Niccolò Machiavelli, 'The Prince', in Roberta Garner (ed.), *Social Theory: A Reader Volume I: The Formative Years*, (Toronto: University of Toronto, 2010), 6-15, p.14.

[13] Cesare Beccaria, *On Crimes and Punishment*, (translated, Edward Ingraham), (NY: Albany, W.C. Little and Co, 1872, originally published 1764).

[14] Hajjar, *Torture: A Sociology of Violence and Human Rights*, p.19.

which (at least implicitly) prohibited torture among other acts. The Lieber Code 1863, for example, stipulated, albeit ambiguously, that 'any revenge wreaked upon him [a prisoner] by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.'[15] Under the *Hague Convention 1899 and 1907*, '[p]risoners of war… must be treated humanely', but again no clarification is provided by what this term means.[16]

Surprisingly, at least from a modern perspective, this lack of clarity provoked little comment during the war crimes trials following WWII. As Dan Plesch points out, there had been few discussions of torture as a concept in the war crimes trials conducted by the International Military Tribunal at Nuremberg (IMT, 1945-1946) and the International Military Tribunal for the Far East (IMTFE, 1946-1948). This absence, he explains, was due to there being 'a surprising consensus on what constituted torture' amongst legal scholars, including the UN War Crimes Commission (1943-1948).[17] During the Cold War era (1947-1991), that international consensus began to dissolve. By the 1960s, it became clear that several UN Member States – including the US – disagreed on what constituted

[15] *Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, 1863,* (Washington, DC: Government Printing Office, 1898), available at the University of Chicago: https://catalog.hathitrust.org/Record/100868332, (accessed 6 September 2019), (referred to hereafter as the Lieber Code), Article 56.

[16] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Chapter II, Article 4. See Blatt, 'Recognizing Rape as a Method of Torture', p.824.

[17] Dan Plesch, *Human Rights After Hitler: the Lost History of Prosecuting Axis War Crimes* (Washington, DC: Georgetown University Press, 2017), p.7. In this context, it is worth noting that the Geneva Convention 1949 and the Additional Protocols II 1977 only vaguely criminalised acts of torture. Likewise, international human rights instruments, such as the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966, state merely that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Articles 3 (1)(a), 32 and 147; International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Article 4 (2)(a); UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, UN, Treaty Series, vol.999, p.171; Universal Declaration of Human Rights, Article 5; *International Covenant on Civil and Political Rights*, Article 7.

torture.[18]

Attempting to clarify what amounted to such acts in international law, the UN General Assembly introduced the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975*.[19] Though not legally binding, the Declaration is an important instrument, because it established as a principle in international law that 'every act of torture is a grave offence against human dignity'.[20] It also formally acknowledged the precedent set by the IMT and IMTFE war crimes trials – that prosecutions for torture must look beyond traditional understandings of what amounts to such crimes, but still without going into detail.

Building on this model, in 1977, the UN General Assembly ordered the UN Commission on Human Rights (1946-2006) to draft a binding treaty based on the Declaration, which would prohibit acts of torture. In 1984, UNCAT was introduced, which hoped to 'achiev[e] a more effective implementation of the existing prohibition under international and national law'.[21] Echoing the definition provided in the Declaration, UNCAT defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with

[18] Plesch, *Human Rights After Hitler*, pp.19-20.
[19] UN General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9 December 1975, A/RES/3452(XXX).
[20] Ibid, Article 2.
[21] Preamble, UNCAT, cited in Alice Edwards, *Violence Against Women under International Human Rights Law*, (Cambridge: Cambridge University Press: 2011), p.200.

the consent or acquiescence of a public official or other person acting in an official capacity.[22]

The UNCAT definition relies on three key factors: the intensity of pain or suffering experienced, the identity of the perpetrator as a state actor, and the official purpose of the torturer to emphasise the public nature of torture.[23] However, judgments about the threshold of severity of pain and suffering involved, moving an event from the private to the public sphere of law, was at the discretion of judges and prosecutors.

Though rape is not formally listed as constituting torture, the provisions contained in UNCAT played a pivotal role in the decisions potentially to categorise rape under this heading by the ICTY, the ICTR and the International Criminal Court (ICC, 2002-present).[24] This potential was realised in a number of cases, but without consistency or explanation. The consequent lack of clarity leads to a questioning of whether this development does constitute a constructive advance in practice.

Rape as a Crime of Torture in International Law

The reports of systematic rape in the former Yugoslavian and Rwandan wars in the 1990s, which created an international demand for such incidents to be prosecuted, ensured that these tribunals considered rape as a headline war crime. Taking into consideration the

[22] UNCAT, Article 1(1).
[23] Richard Carver and Lisa Handley 'Studying Torture Prevention', in Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?*, (Oxford: Oxford University Press, 2017), 1887-926, pp.1911-12.
[24] The focus of this thesis is on the prosecution of rape as a war crime in international law. As such, though other bodies, like the European Court of Human Rights, (ECHR, 1959-present), the Inter-American System – specifically the Inter-American Commission on Human Rights (1959-present) and the Inter-American Court of Human Rights (1979-present) – and the Committee against Torture (1988-present), have also addressed the categorisation of rape as torture these will not be addressed in this chapter. For further information, see *Aydin v. Turkey*, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997; *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-American Commission on Human Rights, 1 March 1996; *Case of the Miguel Castro-Castro Prison v. Peru Judgment*, Inter-American Court of Human Rights, November 25 2006; *Mrs. Pauline Muzonzo Paku Kisoki v. Sweden*, CAT/C/16/D/41/1996, UN Committee Against Torture, 8 May 1996; *C.T. and K.M. v. Sweden*, CAT/C/37/D/279/2005, UN Committee Against Torture, 17 November 2006; *V.L. v. Switzerland*, CAT/C/37/D/262/2005, UN Committee Against Torture, 22 January 2007.

pervasive and orchestrated nature of rape,[25] these ad hoc tribunals determined that the physical harm caused by the act should not be the only factor considered.[26] The cultural, social and political context in which these crimes were committed was agreed as potentially having equal importance when determining state responsibility or action. For example, as touched upon in the previous chapters, in some communities, female chastity continues to be held as central to a family's honour and the stability of its immediate community and, more widely of the national society. Rape victims belonging to these communities are often stigmatised, shamed and ostracised.[27] In light of this cultural context, if acts of rape were identified as being state endorsed weapons of war or acts of genocide, this could constitute torture.[28]

Hypermasculinity and the associated concept of hegemonic masculinity have also been identified by feminist scholarship as playing an important role in the use of rape – perpetrated by and against either gender – as a state-sponsored strategy in conflict. From a hypermasculine perspective, associated with legal processes endorsing patriarchal

[25] See for example, Doris E. Buss, 'Rethinking Rape as a Weapon of War', *Feminist Legal Studies*, (2009), 17(2), 145-63, p.145; Edwards, *Violence Against Women under International Human Rights Law*, p.212.
[26] For example, victims can endure long term physical suffering from disease and infection. Blatt, 'Recognizing Rape as a Method of Torture', p.855-6.
[27] Blatt, 'Recognizing Rape as a Method of Torture', p.855. Rape is used as a tool against women in Latin American states. In these countries, women represent the Virgin Mother (Madonna). Rape is employed to destroy this image: 'The combination of culturally defined moral debasement and physical battering is the demented scenario whereby the prisoner is to undergo a rapid metamorphosis from madonna – respectable woman and /or mother – to whore.' Judy Maloof, *Voices of Resistance: Testimonies of Cuban and Chilean Women*, (Lexington, KY: University Press of Kentucky), p.214; 'For a woman, rape is by far the ultimate offense, sometimes even worse than death because it brings shame on her'. See *Prosecutor v. Milomir Stakić (Trial Judgment)*, IT-97-24-T, ICTY, 31 July 2003, para 803. Peel, 'Introduction', p.12. *The Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo (Decision on Sentence)*, ICC-01/05-01/08, ICC, 21 June 2016, para 39.
[28] Blatt, 'Recognizing Rape as a Method of Torture', p.855-6. Adrien Wing and Sylke Merchán address the relationship between rape and honour in Islamic culture in, Adrien K. Wing and Sylke Merchán, 'Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America', *Columbia Human Rights Law Review*, (1994), 25(1), 1-48, pp.20-5. In some cultures, women's chastity continues to be held 'to represent the chastity of the family and the community.' Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.268. See also, *Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić* (1998) upheld the *Akayesu* decision. *Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić (Trial Judgment)*, IT-96-21-T, ICTY, 16 November 1998, para 495.

authority, deviation by men from the heteronormative standard are 'othered' and acquire a lesser value.[29] The incidents of male-male rape prosecutions mentioned throughout this thesis characterise them as having typically been used in conflict-related environments to lower the social status of victims, by casting doubt on their sexuality, stripping them of their masculinity by feminising them.[30] This tactic is held to break the enemy and undermine wider community structures, emphasising the state involvement in this strategy.[31] As pointed out by Kofi Annan, then UN Secretary General (1997-2006), '[t]he sexual abuse, torture and mutilation of male detainees or prisoners is often carried out to attack and destroy their sense of masculinity or manhood'.[32]

Adam Jones describes male-male rape as '[o]ne of the most lethal gender roles in modern times',[33] and rhetorically asks, 'what greater humiliation can one man impose on another man or boy than to turn him into a de facto "female" through sexual cruelty?'[34] In light of their assessment, the ICTR, the ICTY, and the ICC recognised that rape by and against either gender can constitute torture in international law. In so doing, the question is raised how far they were recognising, in the context of civil war, the hegemonic masculinity inherent in state authority.

This discussion returns us to the debate identified earlier in the chapter over the extent to which charging rape as torture, and thus a public act, represents a constructive

[29] Adam Jones, 'Straight as a Rule: Heteronormativity, Gendercide, and the Noncombatant Male', *Men and Masculinities*, (2006), 8(4), 451-69, p.453; Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.270; Manivannan, 'Seeking Justice for Male Victims of Sexual Violence in Armed Conflict', p.645.
[30] Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.260; 270-2.
[31] Manivannan, 'Seeking Justice for Male Victims of Sexual Violence in Armed Conflict', p.640.
[32] UN, *Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000)*, (2002), para 59. See also Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.270.
[33] Adam Jones, 'Straight as a Rule: Heteronormativity, Gendercide, and the Noncombatant Male', *Men and Masculinities*, (2006), 8(4), p.452; Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.271.
[34] Augusta DelZotto and Adam Jones, 'Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?', Paper presented to the Annual Convention of the International Studies Association, 23-27 March 2002.

advance. For feminists like Susan Brownmiller, rape is 'nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.'[35] This comment, while extreme, serves to underline the broader political dimensions to conflict-perpetrated rape, in terms of the impact not merely on the victim but also on the victim's family and community with all the implications that has for the stability of social hierarchies in targeted groups.[36] In keeping with these claims, Catharine MacKinnon argues that the characterisation of rape as torture in international law is progressive. It brings an acknowledgement that rape is 'neither individual nor random', but defined by shifting socio-political power distribution.[37] The way rape is used as a gendered political tactic in order coerce or intimidate women is also acknowledged.[38] Taking this point further, MacKinnon suggests that all sexual crimes, including rape, constitute a violation of human rights and, as such, should be identified as identified as acts of torture.[39] Such a move would, in her mind, define rape as an offence which is sufficiently serious to constitute torture regardless of whether or not it was perpetrated in a conflict-affected context.[40] But it is particularly urgent to recognise its political nature in conflict-affected environments because, she argues, the political authority of either belligerent side is typically complicit in the execution of rape perpetrated against women, either endorsing or tolerating such acts.[41] For her, then, what is crucial to understand is that rapes

[35] Susan Brownmiller, *Against Our Will: Men, Women and Rape*, (London: Secker and Warburg, 1975), p.15
[36] Blatt, 'Recognizing Rape as a Method of Torture', p.854.
[37] Catharine A. MacKinnon, *Are Women Human?: And Other International Dialogues*, (Cambridge, MA and London: Belknap Press of Harvard University Press, 2006), p.22.
[38] See for example, Blatt, 'Recognizing Rape as a Method of Torture', p.854.
[39] MacKinnon, for example, perceives all sexual crimes, including rape, as a violation of human rights and asks legal scholarship to explain why the label of torture is not universally applied. MacKinnon, *Are Women Human?,* p.17
[40] MacKinnon, *Are Women Human?*, p.17. See also, Clare McGlynn, 'Rape, torture and the European Convention on Human Rights', *International and Comparative Law Quarterly*, (2009), 58(3), 565-95, p.573.
[41] MacKinnon, *Are Women Human*, p.22; Edwards, *Violence Against Women under International Human Rights Law,* p.212

perpetrated in conflict can never be seen as private acts. Her point is that 'the abuse is systematic and known, the disregard is official and organized, and the effective governmental tolerance is a matter of law and policy'.[42]

The emphasis, here, is placed on the group nature of conflict-perpetrated rape incidents, which, in MacKinnon's mind, amounts to a justification of its classification as torture. There is some value to her claim. Indeed, by categorising all rape as torture, women (through organisations such as non-governmental organisations (NGOs)) have the opportunity to assert their rights to claim protection under human rights legislation on an equal basis with men. This works to reinforce the idea, in line with Brownmiller's thinking, that the real harm of rape is less about the individual experiences of victims than it is about the need to identify rape as an exercise of male power and authority. By classifying rape committed in conflict as torture in international law, the state endorsement of male authority over women by any means is prioritised in prosecutions, to the advantage of women's status in law.

Other feminists remain unconvinced of the value of this perspective on conflict-perpetrated rape. Sarah Diebler provides one alternative point of view, in which she challenges the idea that prosecuting rape as torture would be an advance for women. In an echo of the arguments rehearsed in Chapter 5 on the intrinsically gendered nature of rape, she insists that to classify 'rape as inherently an act of torture, not merely torture by virtue of a legal re-categorization' has the effect of undermining traditional notions of rape to the detriment of women victims.[43] In order to engage with these debates, the evolution of torture as a crime in international law needs to be revisited to comprehend the value of the

[42] MacKinnon, *Are Women Human?*, p.25; Edwards, *Violence Against Women under International Human Rights Law*, p.212.
[43] Sarah Diebler, 'Rape by Any Other Name: Mapping the Feminist Legal Discourse Regarding Rape in Conflict Onto Transitional Justice in Cambodia', *American University International Law Review*, (2017), 32(2), 501-37, p.524.

inclusion of rape under this category. Diebler's point is that in considering all rape as coming under this categorisation, torture is affirmed as the most serious crime, while rape as simply an element within that, diminishing the ability of victims to emphasise the individual harms they experience.[44] For her, rape is trivialised thereby, sending the message that the crime itself 'is not necessarily bad', or that 'rape *per se* does not harm.'[45] Presenting a further critical perspective on this matter, Karen Engle expands Diebler's argument by suggesting that in describing rape as torture, a situation is created where the legal stance is that 'women are not capable of not being victimized by the rapes.'[46] Engle insists what is significant is the recognition that for many survivors of conflict-perpetrated rape, their lives have been irretrievably damaged by the violation. This individual experience, she insists, cannot be subsumed into the universal because it does not recognise the range of suffering experienced.[47] For Engle, generalising the harm caused by rape, as MacKinnon advocates, works instead to reinforce the idea that rape is especially damaging to women. More, that as a 'fate worse than death',[48] the effect is to cement the status of rape as a viable weapon in conflict, because it confirms its lasting impact on the individual and their community. In so doing, it also works, she claims, to perpetuate the traditional image of women as helpless victims of conflict.[49]

From a practical perspective, the prosecution of rape as torture by the ICTY and the ICTR demonstrates that fundamental problems remain with its application as a prosecution strategy. Male-female rape, for example, continues to be inconsistently prosecuted a form of torture. For Blatt, the failure to recognise male-female rape as

[44] Ibid, p.527.
[45] Ibid, p.525-6, (emphasis added).
[46] Karen Engle, 'Feminism and Its (DIS)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', *American Journal of International Law*, (2005), 99(4), 778-816, p.813.
[47] McGlynn, 'Rape, torture and the European Convention on Human Rights', p.574.
[48] Engle, 'Feminism and Its (DIS)contents, p.813.
[49] Ibid, p.812.

constituting torture 'is partially rooted in a systematic blindness to the connection between issues of gender and gross human rights violations.'[50] She argues that the rape of a woman is perceived primarily as a sexual offence by the courts. As such, little consideration is given to the political dimension to the crime.[51] In contrast, male-male rape, (when not ignored) has been prosecuted under this heading. By prosecuting male-male rape in this way, the traditional gendered political dimension to conflict-perpetrated violence is emphasised. This is especially the case given that female-perpetrated rape is equally overlooked under this categorisation of what amounts to torture. The conclusions reached by feminist commentators from MacKinnon to Engle is that these different types of rape crimes continue to be valued and understood differently, with rape continuing to be prosecuted on the basis of traditional conceptualisations of rape as a crime committed by men against women. Thus, acts of rape committed against men are typically more easily understood as constituting a form of torture, not rape. This point is further emphasised by cases where prosecutions for conflict-perpetrated male-female rape identify an act of rape as a separate entity in the charge to torture.

That these differing prosecution strategies have attracted much criticism from feminist scholarship has already been noted. Addressing the separation of offences in a range of war crimes prosecutions, Blatt argues that current prosecution practices result in

[50] Blatt, 'Recognizing Rape as a Method of Torture', pp.832 as well as 823-4; 843. This blindness has a powerful historical dimension. As mentioned earlier, torture and other cruel, inhuman or degrading treatment or punishment was previously used as a legitimate form of criminal punishment. It was also employed as a method of interrogation used by armed forces and related state authorities against those considered threats to state security throughout the world. Experts point out that the armed forces and state governments are male-dominated institutions, and that historical examples of women as torturers are unusual. Moreover, women who clearly have been identified as inflicting torture, such as Ilsa Koch at Buchenwald Concentration Camp in Germany during WWII are depicted as transgressing the standards of 'normal' femininity. As the primary perpetrators and victims of torture, instruments that prohibit such acts address only the experiences of men. But a masculine capacity to endure torture has also contained within it a redemptive element, whereby the tortured male who has survived the experience can be valorised as a hero. See also Laura Sjoberg and Caren E. Gentry, *Mothers, Monsters, Whores: Women's Violence in Global Politics*, (London: Zed Books, 2007), especially pp.60-3.

[51] It is because of this implicitly gendered framework to torture as a conflict-perpetrated crime that rape was not initially recognised as torture, despite meeting the criteria. See for example, Ibid, pp.832; 843.

rape being the one act of violence an individual may employ which is not automatically identified as torture.[52] Such a framing of rape incidents as separate to torture also means that the experiences of victims are subjected to further analysis by the courts to test the legal validity of the label. They must first prove that they are rape victim and, second, that their 'rape amounts to torture, or alternatively that any distinctions in their treatment compared to the norm (read: male) justifies the creation of an exception to the rule.'[53] Using this approach in rape prosecutions makes it possible to argue that women are not treated equally in international law.[54]

Labelling male-male rape as torture only also has its limitations if a full range of gender experience is to be considered. Valerie Oosterveld argues that this methodology 'obscures the sexual' dimension of the crime and other implicit assumptions about rape and responsibility for men as well as women.[55] Building on this point, Sandesh Sivakumaran suggests that its categorisation as torture only works to underpin the widely-held hegemonic masculine notions that men cannot be the subject of sexual assault and are not vulnerable to rape.[56] This perspective entrenches the notion that rape is a crime that affects only women and girls in conflict-affected environments.[57] It operates to cement assumptions derived from hegemonic masculinity when identifying responsibility for rape.[58]

For Torbjørn Herlof Andersen, this stance is mirrored in the use of language within society in general as well as the courts and other agencies. Often, he insists, there is no

[52] Blatt, 'Recognizing Rape as a Method of Torture', p.849.
[53] Edwards, *Violence Against Women under International Human Rights Law*, p.198.
[54] Ibid.
[55] Valerie Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals', *Journal of International Law and International Relations*, (2014), (10), 107-28, p.115.
[56] Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.256.
[57] Sandesh Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict', *International Review of the Red Cross*, (2010), 92(877), 259-77, p.273.
[58] Ibid.

discrete set of phrases which can be used by males to articulate their experience of rape as men.[59] At first, Andersen's claim may seem far-fetched to some. Indeed, there are, seemingly, various different terms that can be used to describe an act such as rape. How else can we explain the ability of female rape victims to explain the harm that has been committed against them? But, for Andersen, this is part of the problem. Men, he explains, are conditioned to think of rape victims as being female, and so accept the established female terminology associated with vaginal rape to articulate their range of pain and suffering.[60] Certainly the English language features no distinctively masculine terms which can be used to describe the experience of male rape.[61] This lack of descriptive terminology perpetrates the illusion that rape is a phenomenon that does not affect men.[62] A gender-balanced perspective on male-male rape is therefore difficult to achieve given the importance in courts, as well as in a culture, of the ability effectively to describe and so label a harm committed against an individual.[63] When male victims fail to describe their experience of rape accurately, except in ways that are predicated on descriptors used for and by female rape victims, they are susceptible to being feminised. The preference for male-male rape to be categorised instead under the broader heading of torture is explained, at least in terms of providing a practical strategy for prosecutors.[64]

In the broader context of the MeToo Movement in 2017, Melissa Burkley explored the issue of sexual assault and language, has suggested ways of tackling this problem. Focusing on a statement provided by Terry Crews, an actor, where he likened his experience to being a prisoner of war, Burkley argues that using symbolic terms to describe

[59] Torbjørn Herlof Andersen, 'Speaking About the Unspeakable: Sexually Abused Men Striving- Toward Language', *American Journal of Men's Health*, (2008), 2(1), 25-36, pp.25-6; Manivannan, 'Seeking Justice for Male Victims of Sexual Violence in Armed Conflict', p.651.
[60] Andersen, 'Speaking About the Unspeakable', p.25-6.
[61] Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', pp.255-6.
[62] Manivannan, 'Seeking Justice for Male Victims of Sexual Violence in Armed Conflict', p.651.
[63] Ibid.
[64] Ibid.

male-male sexual assaults is useful. It works to frame the harm in a way that does not feminise the male victim.[65] Indeed, as Alejandra Azuero Quijano and Jocelyn Kelly point out, the United Nations (UN, 1945-present) and international non-governmental organisations (INGOs) increasingly use metaphors to describe acts of sexual violence committed in armed conflict, which has, in turn, permeated the way in which the media reports accounts.[66] In theory, the use of symbolic or metaphoric language can be employed in a way that avoids the pejorative undertones associated with traditional gendered descriptors for rape. From a legal perspective, however, describing male-male rape in such terms is far too vague and unspecific to be usefully applied in the international courts and tribunals.[67]

In this light, perhaps, rather than focusing on the application of symbolic language, emphasis should be placed on resolving the issue that rape continues to be understood and interpreted as a sexual crime perpetrated by men against women. As a result, men do not feel comfortable giving detailed evidence which would label their experience as rape. It is for these reasons that male-male rape continues to be buried in the language of torture, which focuses on pain and suffering in more general terms, avoiding the challenge to their masculine identity resulting from men having to use terms culturally associated with female experience.

---

[65] It is worth noting here that Crews likened his experience to being a prisoner of war: 'When a person of power breaks that boundary, violates that boundary, you're a prisoner of war. Immediately, you're in a camp. Because you're trying to figure out when is the right time to come out. When the guard turns their head? When they leave the door open? You're digging tunnels with spoons and you're trying to find a way out. And then you get out, and you finally find freedom [and speak out] and somebody says, "Well it must not be that bad. You should've come out sooner." And you're like "I'm free! I finally got free!... This is the thing a lot of people don't understand and they end up blaming the victim."' Melissa Burkley, 'Describing Sexual Assault in a Language Men Can Understand', *Psychology Today*, 21 November 2017: https://www.psychologytoday.com/us/blog/the-social-thinker/201711/describing-sexual-assault-in-language-men-can-understand, (accessed 11 August 2020).

[66] Alejandra Azuero Quijano and Jocelyn Kelly, 'A Tale of Two Conflicts: an Unexpected Reading of Sexual Violence in Conflict through the Cases of Columbia and Democratic Republic of the Congo', in Morten Bergsmo, Alf Butenschøn Skre, Elisabeth J. Wood (eds), *Understanding and Proving International Sex Crimes*, (Beijing: Torkel Opsahl Academic EPublisher), 437-90, p.475.

[67] Ibid.

Recommendations

This chapter demonstrates that the specialist international courts have struggled to use the terms 'rape' and 'torture' in ways that signal an equal appreciation of the nature of the harm caused. It has revealed a preference of instead continuing to emphasise a distinction between male-female and male-male rape that is rooted in gendered thinking. In other words, they have often failed to acknowledge the crime of rape as well as the use of rape as a form of torture on a gender-neutral basis. It is essential that this problem is addressed. It is important for these modern international tribunals and courts to identify clearly when and why an act of rape does or does not constitute a form of torture. As touched upon by Sivakumaran, '[a]n accurate classification of abuse is important not just to give victims a voice,' but 'to break down stereotypes and not merely to accurately record the picture.'[68] Taking this point further, L. M. Finley points out that language generally, and legal language especially, 'reinforces certain world views and understandings of events… Through its definitions and the way it talks about events, law has the power to silence alternative meanings – to suppress other stories'.[69] It is important that these accounts are not suppressed.[70] Describing rape as a crime of torture, rather than separating these crimes in the charges and sentencing stages is a central aspect of this process.[71] A comprehensive explanation for why an act of rape has not qualified as a crime of torture is equally important. This will help address the issue of ambiguity present in current judgments.

To monitor the success of these recommendations, future institutional development and decisions must be examined. For example, it is important to look at international

[68] Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.257.
[69] Lucinda M. Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning', *Notre Dame Law Review*, (1989), 64(886), p.888; Kelly Dawn Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', *American Journal of International Law*, (1999), 93(1), 97-123, fn 31; Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.257.
[70] Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', p.257.
[71] Like the prosecution and charge of rape as an outrage upon human dignity in international law.

bodies, such as the ICC, focusing on the quality and clarity of judgments.[72] The Committee against Torture (1988-present) – a body of 10 independent international experts that monitors the implementation of the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* by its State parties – could also take a more active role in the interpretation of the Convention by providing additional comments on decisions, which would identify whether such outcomes were in line with best practice. In agreement with John Parry, this approach would not necessarily eliminate the issue of ambiguity but it could potentially reduce the areas in which ambiguity appears.[73]

Conclusion

In theory, the categorisation of rape as a form of torture in international law should operate as a useful advance. It has the potential to describe the degree of physical and mental pain and suffering caused by acts of rape without the pejorative stigma. By characterising conflict-perpetrated rape as a political harm, the pervasiveness of the crime is also underlined. It recognises that in some cultural contexts, rape carries consequences that go beyond the short-term suffering inflicted. From this perspective, this framework should cement the identification of rape as a serious war crime.

From a practical perspective, the prosecution of rape as torture by the ICTY, the ICTR and the ICC demonstrates fundamental problems with its application as a prosecution strategy. For example, male-female rape continues to be inconsistently prosecuted as a form of torture. Where male-male rape is described as a crime of torture, the political as well as the gendered dimension to the violence is prioritised. Female-perpetrated rape, on the other hand, is largely overlooked under this category. These

[72] John T. Parry, *Understanding Torture: Law, Violence, and Political Identity*, (Michigan, MI: University of Michigan Press, 2010), p.42.
[73] Ibid.

contrasting approaches underline that these different types of rape crimes continue to be valued and understood differently. This issue is rooted in the traditional conceptualisation of rape as a crime committed by men against women. Thus, acts of rape committed against men are typically understood as constituting a form of torture only, not rape. In contrast, the rape of a woman is considered an act of rape first. Only after a separate analysis has been completed will the element of torture be considered. In order for torture to be employed as part of an international lexicon of rape, it is important that these problems are addressed. Drawing together the threads of the arguments presented in this thesis thus far, the next chapter explores the role played by international bodies, particularly the UN, given their accepted authority as the institutions through which international law and its practices have evolved. In that they have been, since 1945, the key players for sanctioning international legal processes, the framework that such bodies provide for understanding the full range of factors needing to be considered when exploring the context in which a lexicon used to prosecute conflict-perpetrated rape emerged is significant.

Chapter 8

The Role of Institutional Authority: The United Nations

Introduction

The previous chapters critically examined the lexicon of rape in modern international law. They focused on the historical and cultural dimensions in which the terms used to categorise rape in modern international law have emerged and been used by authorities within the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017), the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) and the International Criminal Court (ICC, 2002) to prosecute offenders. Building on this analysis, this chapter now considers the role played by the institutional authority which oversees these modern specialist international courts – the United Nations (UN, 1945-present) – in that the cultural agendas of its associated bodies derives from that source. Attention here will be on the institutional culture within the UN in order to understand the ways in which that culture influenced prosecutions for conflict-perpetrated rape within the ICTY, the ICTR, and continues to do so within the ICC.

As the central force behind the creation of the ICTY, the ICTR and the ICC, the UN has undoubtedly influenced their cultural framework of operations, including the role of their sitting judges and other officials. As previous chapters have underlined the impact of the sitting judges on prosecutions and their outcomes has been significant. However, the appointment of such individuals is done according to the expectations conveyed by the broad cultural agendas purveyed by the UN. It is critical, then, to explore the UN's attitude towards and response to conflict-related rape, in order to determine the extent and significance of the cultural messages disseminated by the organisation on these specialist international criminal courts. Key to this analysis will be the role played by leading UN

figures, notably the Secretary General, and the UN Security Council, the body visibly responsible for passing the series of Women, Peace and Security Resolutions which contexualise recent war crimes prosecutions. Consideration also needs to be given to claims that, as a male-dominated institution, the UN itself perpetuates hypermasculinity[1] and, as such, continues to promote a culture of impunity towards rape among other related crimes.[2] While its response towards reports of rape committed by its deployed peacekeepers will not be addressed in detail within this chapter, the criticisms of the UN's attitude to such claims provide corroborating evidence of the existence of such a culture within the UN, and of the impact it has on UN appointed and sanctioned bodies. This analysis will work to establish how far the historical legacy identified in Chapter 2 has underpinned the workings of the UN (and, in turn, the ICTY, the ICTR and the ICC), and institutionalised a cultural approach to the prosecution of rape which is, despite the official claims, very far from gender neutral in practice.

Background

The rationale behind the UN's decision to establish the ICTY, the ICTR and the ICC is seated in its founding mission of maintaining international peace and security by either preventing conflict or creating an environment within which peace and security can be re-established in the aftermath of war. As part of implementing this mission, the UN has also made a concerted effort to create a cultural framework which can address more broadly the topic of rape committed in (post-)conflict situations. It has sought to achieve this outcome through various peace and security instruments, most notably landmark UNSCR

[1] Defeis, 'U.N. Peacekeepers and Sexual Abuse and Exploitation', p.191; Most personnel in peacekeeping missions are men. Carol Allais, 'Sexual Exploitation and Abuse by UN Peacekeepers: The Psychological Context of Behaviour Change', *Scientia Militaria, South African Journal of Military Studies*, (2011), 39(1), 1-15, p.3.
[2] Sanford, Stefatos and Salvi, 'Introduction', pp.2-3.

1325 (2000).[3] Since its inception, the UN has introduced numerous other resolutions focusing on women and remedies for injustice perpetrated against them during conflict, in the context of achieving and maintaining international peace and security. In light of the discussions in the previous chapters, the usefulness of these instruments in supporting the operations of courts like the ICTY, the ICTR and the ICC itself is questionable. Critics of the UN like Anne-Marie Goetz, for example, argue that these resolutions continue to employ (to varying degrees) traditional gender essentialist standards, which undermine attempts at achieving a more balanced inclusionary strategy for women in peace and security initiatives broadly.[4] This thesis sees this gendered perspective as being endemic within the UN, and as having also had a damaging effect on the culture within which both international tribunals and the ICC frame their operations. It is important here to note that the ICTY and the ICTR both pre-date the core Women, Peace and Security Resolutions which have been so strongly critiqued by figures like Goetz. While the ICC was set up at a time when these Resolutions were continuing to appear, it needs to be understood as providing a continuing reflection of the intrinsic culture of the UN, expressed through the comments of individuals like the Secretary General and the debates of the Security Council when evolving the Resolutions.

The perpetuation of cultural essentialism within the UN, which is, here, allied to gender essentialism, primarily views men as natural aggressors (relating to both hegemonic masculinity and its expression in a hypermasculine culture), while leaving women as agentless victims. This framework serves, amongst other things, to normalise

[3] UN Security Council, Security Council Resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325: https://www.refworld.org/docid/3b00f4672e.html, (accessed 29 August 2020).
[4] See Judith Rowbotham and Fiona Tate, 'The Global Summit: End Sexual Violence in Conflict Now', *Law, Crime and History*, (2014), 4(2), 91-8.

instances of heteronormative rape in (post-)conflict[5] and ignore female-perpetrated rape (committed against either gender) and male-male rape, both of which are more prevalent than traditionally assumed.[6] It is important to integrate into the considerations made by this thesis a recognition of the cultural power of official bodies. Previous chapters have addressed this dimension when considering the approaches to prosecutions for conflict-perpetrated rape of the ICTY, the ICTR and the ICC. But the purpose of this chapter is to explore the overarching impact on bodies like these of supra-national institutions, notably the UN, over the workings of bodies set up under their umbrella. This will start with an analysis of hypermasculinity to reveal how its role within the UN supports a culture of immunity and impunity for actions relating to conflict-perpetrated rape.

Hypermasculinity, Immunity and Impunity

Core to the analysis provided in this chapter is the concept of hypermasculinity (as discussed in Chapter 1). While most regularly used to describe military institutions, hypermasculinity can also usefully be invoked to explain the culture within many state-related official bodies, such as a nation's civil service or other bureaucratic institutions. Hypermasculinity refers to the amplification of traditional masculine behaviour and traits, including aggression, strength and sex drive, which can be manifested in bodies which derive their power from a traditionally patriarchal view of authority and identification of who has the right to wield that authority.[7] In the context armed conflict, hypermasculinity

[5] Victoria Sanford, Katerina Stefatos and Cecilia Salvi, 'Introduction', in Victoria Sanford, Katerina Stefatos and Cecilia Salvi (eds), *Gender Violence in Peace and War: States of Complicity*, (New Brunswick, NJ: Rutgers University Press), 1-18. pp.2-3.
[6] Stuart Casey-Maslen, (ed.), *The War Report: Armed Conflict in 2013*, (Oxford: University of Oxford, 2014), pp.277-8.
[7] *Collins Dictionary*: https://www.collinsdictionary.com/dictionary/english/hypermasculine, (accessed 12 August 2019). It is often argued that patriarchal gender norms and relations predispose societies to conflict. In extreme patriarchal societies, men are socialised into attitudes linking masculinity to power and entitlement. To achieve and maintain dominance and control, physical and mental violence, particularly sexual, are perceived as acceptable tools.

has been used to describe men's propensity to use violence, including sexual, against others to safeguard their families, communities, and nation as something intrinsic to the biological male.[8] Kimberly Theidon concludes that '[c]onstructing certain forms of masculinity is not incidental to militarism; rather, it is essential to its maintenance. Militarism requires a sustaining gender ideology as much as it needs guns and bullets.'[9] Women, from this perspective, are necessarily framed as natural targets for male violence, needing either to be protected or sexually exploited depending on the view taken by the dominant military authority.[10] The outcome is the normalisation of war and male-perpetrated violence in patriarchal societies.[11]

As touched upon earlier, critics of the UN claim that hypermasculinity has played a significant role in the development of their peace and security initiatives regarding rape, including in the operations of the international courts and tribunals. Elizabeth Defeis argues, for example, that as a male-dominated institution, the UN itself perpetuates a hypermasculine culture which tolerates rape, because such acts are identified as natural outcomes of military involvement in peace and security.[12] Indeed, Yashushi Akashi, Special Representative of the UN Secretary-General in Cambodia (1992-1995) simply retorted 'boys will be boys' when asked about allegations that UN peacekeepers based in Cambodia had committed sexual exploitation and abuse (discussed in Chapter 1) against civilians in the 1990s.[13] This kind of response from a senior UN figure normalises rape as

[8] Hannah Wright, *Masculinities, conflict and peacebuilding: Perspectives on men through a gender lens*, (London: Saferworld, 2014), p.6.
[9] Kimberly Theidon, 'Reconstructing masculinities: The disarmament, demobilisation and reintegration of former combatants in Colombia', *Human Rights Quarterly*, (2009) 31(1), 1-34, p.3.
[10] Wright, *Masculinities, conflict and peacebuilding*, p.6.
[11] See for example, ibid, p.9.
[12] Defeis, 'U.N. Peacekeepers and Sexual Abuse and Exploitation', p.191; Most personnel in peacekeeping missions are men. Carol Allais, 'Sexual Exploitation and Abuse by UN Peacekeepers: The Psychological Context of Behaviour Change', *Scientia Militaria, South African Journal of Military Studies*, (2011), 39(1), 1-15, p.3.
[13] Allais, 'Sexual Exploitation and Abuse by UN Peacekeepers', p.3; Gabrielle Simm, *Sex in Peace Operations*, (Cambridge and New York, NY: Cambridge University Press, 2013), p.24.

inevitable masculine behaviour, something which has clear and wider implications for the ability or genuine willingness of UN-sanctioned and instituted courts to bring prosecutions for conflict-perpetrated rape.[14] This indicates the importance of reflecting upon the Women, Peace and Security Resolutions passed from 2000 on. This can aid an understanding of the challenges to the underlying culture of the UN and its present lexicon of rape in international law posed by the cultural attitudes they sought to encapsulate. It is important to note as part of this reflection information about which country holds the presidency of the UNSC at the time that a relevant Resolution is passed. Just as the make-up of a bench has been shown to be a factor when understanding the outcome of prosecutions, so too with the Security Council, the framing and language of resolutions is affected by the attitudes of the country holding the presidency when a resolution is passed.[15]

UN Security Council Resolutions

(a) UNSCR 1325, 1820, 1888, 1960 and 2106

UN Security Council Resolution 1325 (2000), as mentioned earlier, is widely regarded as an important instrument within the international community. While passed after the establishment of the ICTY and the ICTR, it is illustrative of the UN attitudes of the 1990s.

[14] Such attitudes have had wider implications for the UN's general response to claims of sexual exploitation and abuse committed in (post-)conflict by its personnel. This point is demonstrated in the *Report of the Panel on UN Peace Operations* (the *Brahimi Report*, 2000), which looks at the UN's ability to effectively conduct peace missions and provides recommendations to enhance their capacity. Describing the need for reform, the *Brahimi Report* outlines the pivotal role the UN plays in promoting international human rights standards and international humanitarian law in all areas of peace and security. Though the *Brahimi Report* lists more than 80 recommendations regarding the ways in which the UN can alter their peacekeeping operations, most of them address administrative deficiencies. No reference is made to the challenges associated with cultural attitudes and non-compliant peacekeeper conduct. For example, rape is mentioned only once in passing, despite its high media profile. The Panel on United Nations Peace Operations, *Report of the Panel on United Nations Peace Operations, delivered to the Security Council and the General Assembly*, U.N. Doc. A/55/305, S/2000/809, 21 August 2000.

[15] The presidency revolves on a monthly basis, and thus it is important to note the presidency at the beginning of the process of evolving a resolution as well.

Indeed, the factors leading to its evolution and passing are very similar to those encouraging these tribunals to prosecute rape and come up with definitions for this purpose. The background to the emergence of UNSCR 1325 can be held to lie in the Beijing Declaration in 1995, and the subsequent lobbying by various civil society groups, notably the Coalition on Women and International Peace and Security. Notably, Namibia[16] held the presidency in October 2000, and having no agenda of reservations, it sponsored an open session on Women Peace and Security, which resulted in the adoption by the Council of the Resolution. UNSCR 1325 represents the first resolution to address specifically the impact of war on women and girls as well as the role of women in conflict management, prevention, resolution and peacebuilding.[17] To ensure, for example, that a gender perspective is incorporated into all peace and security initiatives, the Resolution recommends that gender mainstreaming be implemented, and promoted by the provision of gender training.[18] It urges all parties involved in 'armed conflict to take special measures to protect women and girls' from rape and other forms of sexual violence (see Appendix 3).[19]

For those experts supportive of the UN's actions, like Nicola Pratt, Sophie Ritcher-Devroe and Amy Barrow, UNSCR 1325 remains significant because it addresses the experiences of women in conflict situations[20] and frames rape as a weapon of war.[21] The

[16] Newly-independent from South Africa, Namibia was, in 2000, interested in seeking the support of a range of non-standard civil society groups outside its immediate region, hence its willingness to listen to lobbyists such as the Coalition on Women and International Peace and Security. See A.Bosl, 'Namibia's Foreign Relations in a Changing World. An Appraisal', in A. Bosl, A. du Pisani and D. Zaire (eds), *Namibia's Foreign Relations. Historic contexts, current dimensions and perspectives for the 21st century*, (Windhoek: Konrad Adenauer Stiftung, 2014), 3-26.
[17] Amy Barrow, 'UN Security Council Resolutions 1325 and 1820: constructing gender in armed conflict and international humanitarian law', *International Review of the Red Cross*, (2010), 92(877), 221-34, p.229.
[18] UNSCR 1325, paras 6-7; 17. On the link between gender mainstreaming and training, see Lesley Abdela, 'Witness to History: A "Boots-on-the-Ground" Perspective. Fighting for Gender Balance and Gender Justice', *Britain and the Wider World*, (2016), 9(1), 116-31.
[19] Ibid, para 10.
[20] Barrow, 'UN Security Council Resolutions 1325 and 1820', p.229.
[21] Nicola Pratt and Sophie Richter-Devroe, 'Critically Examining UNSCR 1325 on Women, Peace and

Resolution explicitly urges an end to impunity for such crimes.[22] Significantly for this thesis, the Resolution's agenda is intended to challenge the patriarchal norms, belief systems and traditions which influence gender relations within societies.[23]

The extent to which UNSCR 1325 advances understandings of rape beyond the scope of traditional hypermasculine standards is questionable. The Resolution makes no substantive attempt to broaden the basis on which victims could be identified to avoid prejudicial gender assumptions. Women and girls are grouped together and are identified as victims in need of special protection. This grouping is particularly damaging for women, because it frames them as immature agentless victims in need of masculine protection,[24] reinforcing patriarchal norms as well as endorsing gender essentialist standards rather than challenging them.[25] Men are not engaged or confronted with the implications of their cultural masculinities and gendered attitudes for women. Since mention of men as potential rape victims is not included in any direct way, the possibility of women acting as perpetrators is also overlooked.[26]

Critics of UNSCR 1325 insist that the language used to convey the remedies outlined in the Resolution is simply rhetorical. It fails to address the patriarchal roots of

---

Security', *International Feminist Journal of Politics*, (2011), 13(4), 489-503, p.490.

[22] Jackie Kirk and Suzanne Taylor, 'UNSCR 1325', *Forced Migration Review*, (2007), 27, 13-4, p.13.

[23] Hussaina J. Abdullah, 'Women and the African Peace and Security Architecture', African Peacebuilding Network, APN working papers, (2017), no.12: https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/women-and-the-african-peace-and-security-architecture.pdf, (accessed 5 September 2019), pp.2-3.

[24] Róisín Burke, 'Shaming the State: Sexual Offences by UN Military Peacekeepers and Rhetoric of Zero Tolerance', in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security*, (Basingstoke: Palgrave MacMillian, 2014), 70-95, p.73; Mari Katayanagi, 'UN Peacekeeping and Human Rights', in Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights*, (New York, NY: Cambridge University Press, 2014), 123-53, p.145.

[25] See for example, Maria Martin de Almagro, 'Transitional Justice and Women, Peace and Security: A Critical Reading of the EU Framework', *LSE Women, Peace and Security Working Paper Series*, (2017), 5, 1-14, p8.

[26] For a discussion on female-perpetrated rape, amongst other acts, see Laura Sjoberg, 'Agency, Militarized Femininity and Enemy Others: Observations From The War In Iraq', *International Feminist Journal of Politics*, (2007), 9(1), 82-101.

rape perpetrated in conflict because it does not tackle the need for an eradication of gender privilege in post-conflict states.[27] As F. B. Gumru and J. M. Fritz point out, without a legal requirement to enforce compliance, UNSCR 1325 ends up being inconsistently and ineffectively implemented.[28] This lack of enforcement is a consequence of the passive language employed in the Resolution where, amongst other significant indicators, troop contributing countries are asked merely to 'consider', or are 'urged or 'called upon' to take certain actions. The resort to the purely discretionary in that area is indicative of the implication that discretion is also to be used when considering the priorities accorded to rape prosecutions. It emphasises that without the creation of legal rules requiring and enabling enforcement, law becomes empty rhetoric.[29] It is a declaration of desired intent without a duty to implement, a choice that raises the question regarding the genuine will of the UN to enforce its declared position.[30] The absence of accountability, evaluative and disciplinary mechanisms within the Resolution limits its effectiveness.[31] The Resolution is to be condemned for not indicating clearly what is meant in practical terms by 'gender mainstreaming' in relation to peacekeeping operations. There is, notably, no stipulation on how gender mainstreaming processes should operate within the peace and security

[27] Jill A. Irvine, 'Leveraging Change: Women's Organizations and the Implementation of UNSCR 1325 in the Balkans', in Nicola Pratt and Sophie Richter-Devroe (eds), *Gender, Governance and International Security*, (London and New York: Routledge: Taylor & Francis Group, 2014), 146-65, p.147; Gina Heathcote, 'Participation, Gender and Security', in Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security*, (Basingstoke: Palgrave Macmillan, 2014), 48-69, p.53.

[28] F. B. Gumru and J. M. Fritz, 'Women, Peace and Security: An Analysis of the National Action Plans Developed in Response to UN Security Council Resolution 1325', *Societies Without Borders*, (2009), 4(2), 209-25, p.213.

[29] Here rhetoric is being employed as originally understood by the Greeks and Romans, as a linguistic tool which, where properly employed, has the power to maintain or transform cultures and communities through its effective presentation of law in particular. See James Boyd White, 'Law as Rhetoric, Rhetoric as Law: the Arts of Cultural and Community Life', *University of Chicago Law Review*, (1985), 52(3), 684-702.

[30] Gumru and Fritz, 'Women, Peace and Security', p.213.

[31] Kirk and Taylor, 'UNSCR 1325', p.13; Christy Fujio, 'From Soft to Hard Law: Moving Resolution 1325 on Women, Peace and Security Across the Spectrum', *Georgetown Journal of Gender and the Law*, (2008), 9(1), 215-35, pp.224-5.

framework, and this lack has implications for a similar omission within the culture of the courts.[32] Neither is there provision in the Resolution for establishing monitoring processes to assess the impact gender mainstreaming strategies have on either court prosecution choices or strategies for reducing rape by peacekeepers.[33]

Reflecting on UNSCR 1325, Goetz comments that while it is to be seen as a failure, this is not necessarily because of the actual terms of the Resolution. The problem lies with the UN's lack of will to realise the standards they advocate.[34] This reluctance perpetuates the institutionalisation of hypermasculinity within the organisation because the UN as a whole, and the UN Security Council (UNSC, 1945-present) specifically, continues, as Gina Heathcote puts it, to function 'through a series of gendered normative assumptions'.[35] The resulting ongoing culture of impunity towards rape is a direct consequence of this lack of action. Goetz and Heathcote's comments underline the need for an alternative focus on removing institutionalised gender privilege, instead of relying upon the established masculine norms, which serve to justify exploitative male behaviour as 'normal' conduct.[36]

In addition to UNSCR 1325, women's participation is addressed in a series of other resolutions on conflict-related sexual violence, including 1820 (2008), 1888 (2009), 1960 (2010) and 2106 (2013).[37] Spearheaded by the UK and US representatives within the UNSC, who are known to have paid particular attention to initiatives regarding (post-

[32] Barrow, 'UN Security Council Resolutions 1325 and 1820', p.230.
[33] Kirk and Taylor, 'UNSCR 1325', p.13; Fujio, 'From Soft to Hard Law', p.224.
[34] Rowbotham and Tate, 'The Global Summit', pp.81-2.
[35] Heathcote, 'Participation, Gender and Security', p.53.
[36] Women Peacemakers Program, 'Conciliation Resources and Kingdom of the Netherlands', in *Taking UNSCR 1325 to the Next Level: Report and Recommendations*, Permanent Mission of the Netherlands, Conference Report, 30 October 2013: https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Report%20NY%201325.pdf, (accessed 24 August 2019), p.4.
[37] UN Security Council, Security Council Resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820: https://www.refworld.org/docid/485bbca72.html, (accessed 29 August 2020); UN Security Council, Security Council resolution 1888 (2009) [on acts of sexual violence against civilians in armed conflicts], 30 September 2009, S/RES/1888 (2009): http://unscr.com/en/resolutions/1888, (accessed 29 August 2020); UN Security Council, Security Council Resolution 1960 (2010) [on women and peace and security], 16 December 2010, S/RES/1960: http://unscr.com/en/resolutions/1960, (accessed 29 August 2020); UNSCR 2106.

)conflict sexual violence (including rape), each of these resolutions refer to women's participation as a necessary component to 'either to protect women from conflict-related sexual violence or to add preventative measures.'[38]

Yet, despite their intention, each of these resolutions are lacking in the ability to promote practical implementation of strategies for boosting women's participation. This deficiency has implications for the degree of urgency (or lack of it) accorded by the ICTY and the ICTY, and subsequently the ICC, to bringing prosecutions for conflict-perpetrated rape. For example, recognising the systematic nature of rape in armed conflict and its enduring impact, UNSCR 1820 builds on UNSCR 1325 by explicitly linking such offences to peace and security responsibilities in the broadest sense (see Appendix 3). It calls for an end to impunity, by demanding that 'all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence', including rape.[39] Passed during the presidency of the US in June 2008,[40] UNSCR 1820 does display an unusual imperative by detailing some strategies. These, however, focus more on measures aimed at the training of troops entrusted with peacekeeping duties rather than on international and local court personnel. The evocation of issues relating to sexual violence is characterised by an emphasis on strategies for enforcing disciplinary measures relevant for peacekeeping, but not on how to create a sympathetic environment within the courts, especially for potential witnesses in rape prosecutions. Even more tellingly, Resolution 1820, like UNSCR 1325, cannot produce adequate change, because it also lacks the capacity for enforcement.[41] No penalty is listed

[38] Gina Heathcote, 'Security Council Resolution 2242 on women, peace and security: progressive gains or dangerous development?', *Global Society*, (2018), 32(4), 374-94, p.379.
[39] UNSCR 1820, para 3.
[40] The UK had held the presidency in the previous month, May 2008.
[41] See for example, Fiona Tate, 'Impunity, Peacekeepers, Gender and Sexual Violence in Post-Conflict Landscapes: A Challenge for the International Human Rights Agenda', *Law, Crime and History*, (2015), 5(2), 69-96, pp.82-4.

for failure to implement such training The Resolution provides only that 'women and children under imminent threat of sexual violence… are to be evacuated', without any consideration of the potential need for protection of witnesses and the preservation of evidence of rape or other forms of sexual violence.[42] The continuing emphasis on the need to protect of women and girls in particular cements the traditional perspective that these are special, vulnerable groups in need of military protection.[43]

For Sandesh Sivakumaran, it is where the language used in UNSCR 1820 is either inclusive or exclusory that is most telling.[44] When attempting to describe problems of rape as part of general procedure, the language is inclusive.[45] Where it moves to specify methods of enforcement or implementation, the language used changes to being exclusory.[46] That discrepancy appears in passages where implementation and descriptive methods are considered together or where specific and general measures are addressed together.[47] For example, in discussion with the Secretary-General, troop-contributing countries are encouraged to 'consider steps they could take to heighten awareness and the responsiveness of their personnel participating in UN peacekeeping operations to protect civilians, including women and children, and prevent sexual violence against women and girls in conflict and post-conflict situations.'[48] Sivakumaran observes that when heightening responsiveness and awareness, again, the language is inclusive of all groups.[49] But when the subject changes to matters of practical strategy in the prevention of rape, females are the only objects of protection mentioned directly.[50] This framework

[42] UNSCR 1820, para 3.
[43] Ibid, p.2; paras 3; 8; 9.
[44] Sandesh Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict', *International Review of the Red Cross*, (2010), 92(877), 259-77, p.267.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] UNSCR 1820, para 8.
[49] Sivakumaran, 'Lost in translation', p.268.
[50] Ibid.

perpetuates the idea that women and girls are the prime victims of rape and other forms of sexual violence, while ignoring the reality that men too are vulnerable to such attacks. This lack helps to explain the persistence of gender essentialism by these courts operating under a UN umbrella. Though the Resolution refers to rape and other forms of sexual violence committed against civilians, its focus presents little space to account for male rape victims.[51]

UNSCR 1820 cannot be dismissed as totally ineffective. Coupled with UNSCR 1325, some important changes have been made more broadly, which have created opportunities for women to petition and advocate for social change during moves from conflict to peace.[52] Notwithstanding, UNSCR 1820 fails to cover the aforementioned complexities associated with rape experienced in situations of armed conflict. Gender biased understandings about conflict are perpetuated in ways which fail to address the changing practices of political violence.[53]

Similar problems are found in UNSCR 1888 (2009). Like its predecessors, the Resolution expresses its *intention* to organise 'interactive meetings with local women and women's organisations'; *urges* the Secretary-General, 'Member States and the heads of regional organizations to take measures to increase representation of women' in both mediation and decision-making processes; and *encourages* Member States to increase female police and military personal 'all with a view to preventing and representing conflict-related sexual violence.'[54] In sum, these provisions work to place a detrimental emphasis of women's victimisation.[55]

[51] Karen Engle, 'The Grip of Sexual Violence', in Heathcote and Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security*, 203-23, p.28.
[52] Abdullah, 'Women and the African Peace and Security Architecture', p.3.
[53] Jennifer Park, 'Sexual Violence as a Weapon of War in International Humanitarian Law', *International Public Policy Review*, (2007), 3(1), 13-8, p.14.
[54] Heathcote, 'Security Council Resolution 2242 on women, peace and security', p.379.
[55] Engle, 'The Grip of Sexual Violence', p.26.

Some attempts at advancement is seen in UNSCR 1960 (2010),[56] in that it sets up a so-called 'naming and shaming' mechanism. Once again, passed under the presidency of the US, and with the UK having held it the previous month, the mechanism meant that , in theory, 'parties that are credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence'[57] are to be identified and listed in annual reports, which are to submitted to the Secretary-General along with information on such parties.[58] Though it clearly addresses sexual violence committed against women and girls, 'because its operative paragraphs are gender-neutral', Engle explains, the Resolution has been read as also applying to male victims, which is undoubtedly progressive.[59] It should, therefore, be an encouragement to a greater level of acceptance of a need to prosecute rape as a gender-neutral offence, and a potential encouragement to include at least male-male rape as a key issue in addressing conflict-perpetrated rape.

This point, for Engle, is further enforced in the employment of the term 'conflict-related sexual violence' within Resolution 1960. According to her, the use of such language reflects the UNSC's intention move away from earlier terminology,[60] which is a necessary advance. To cement this claim, Engle calls on Margot Wallström's statement, then Secretary General's Special Representative on Sexual Violence in Conflict (2010-2012):

> Sexual violence as a tactic or consequence of war could not be captured under existing categories. Cases against men and boys did not fall under 'violence against women'; 'harmful traditional practices' mischaracterised sexual

[56] Ibid, p.25.
[57] UNSCR 1960, para 3.
[58] Engle, 'The Grip of Sexual Violence', p.28.
[59] Ibid, p.25.
[60] Ibid, p.28.

> violence as cultural or traditional; and 'gender-based violence' did not reflect sexual violence as a method of ethnic cleansing or a tactic of terror. [61]

Engle explains that UN Action similarly asserts that the Resolution symbolises that the UNSC now recognises that conflict-related sexual violence is a 'self-standing issue of concern', which should be considered and treated as such moving forward.[62] To adopt 'greater specificity and disaggregation of incidents', UN Action maintains that 'conflict-related sexual violence should no longer be treated as "gender-based violence" and "violence against women"'.[63] This development has, potentially, considerable power to promote a greater willingness to revisit the parameters of the lexicon of rape utilised for prosecutions in conflict-perpetrated examples. The reality in the courts, however, has been less encouraging in that there remains a lack of a clear link between perpetration of types of sexual violence and their identification as gender-neutral offences.

Though, on the one hand, use of the term 'conflict-related sexual violence' does constitute a step forward, particularly in the context of the gender-neutral framework provided in UNSCR 1960, this thesis argues that it does not necessarily capture the reality that such acts are often used individuals because of their gender. To not recognise or engage with this reality, as touched upon in Chapter 5, risks 'attacking the symptom while failing to thoroughly address discriminating gender relations as one of the underlying problems.'[64]

Further challenges relevant to effective prosecution of conflict-perpetrated rape are presented in the 'naming and shaming' provision found in UNSCR 1960. Heathcote, for example, argues that any list created in this context:

[61] Ibid, pp.29-30.
[62] Ibid, p.30.
[63] Ibid.
[64] Ibid.

> will be undermined by the combination of a potential conflict of interests for humanitarian workers and the potential for mislabelling non-state actors, particularly members of armed groups, as responsible for sexual violence in armed conflict without paying appropriate attention to established due process and the rule of law.[65]

This point indicates the problems for the courts of assembling the robust evidence needed for successful prosecutions as well as the unresolved issues relating to the protection of vulnerable witnesses in court cases.

It is, perhaps, because of these problems that the UNSC itself noted that implementation of Resolution 1960 was slow. To address this issue, in 2013, a follow-up resolution in the form of UNSCR 2106 was passed during the UK's presidency of the Council. This Resolution offers more operational detail and emphasises on the need to end impunity on sexual violence. It calls for more Women's Protection Advisors and Gender Advisors in the field, and also addresses women's participation as a way of enhancing women's protection from conflict-related sexual violence.[66] The Resolution also recognises males as sexual violence victims, confirming and continuing the trend toward gender-neutrality.[67] Once again, however, the emphasis is on the management of peacekeeping. No specific measures are aimed at improving the willingness of international courts to contribute to this area, even though the justification for these bodies rests in their supposed ability to promote peace via improved post-conflict resolution of injustices.

---

[65] Gina Heathcote, 'Naming and Shaming: Human Rights Accountability in Security Council Resolution 1960 (2010) on Women, Peace and Security', *Journal of Human Rights Practice*, (2012), 4(1) 82-105, p.82.
[66] UNSCR 2106, paras 11; 16 and 21. See also Heathcote, 'Security Council Resolution 2242 on women, peace and security', p.379.
[67] Engle, 'The Grip of Sexual Violence', pp.30-1.

For Heathcote, the totality of these aforementioned resolutions is to reduce the UNSCR 1325 framework of 'women's participation in peace and security matters as one driven by a need to address conflict related sexual violence.'[68] This 'reduction of women's participation to… a protective participation model' is, as she describes, unfortunate.[69] She suggests that the underlying feminist model that this approach might be linked to is that of the US[70] strands of radical feminism, 'where women's sexual vulnerability and subordination is regarded as the central site of women's disempowerment and discrimination',[71] something which was reflected in the ability of women to see charges of rape brought against male assailants.[72] This feminist approach has been strongly criticised for promoting a type of 'victim feminism within the international order and exporting a limited feminist model into the global order'.[73] It has also been condemned for framing conflict-related sexual violence as '*the* paradigmatic experience of women during armed conflict', which, as previous chapters have underlined, has had a significantly detrimental effect on developments of a genuinely gender-neutral understanding in the current lexicon of rape in international law and its impacts.[74] Heathcote argues that this understanding 'may deflect attention from economic needs, gender-based violence and the role of gendered power relations in producing the myriad of gendered harms that communities experience,' which has negative connotations for the ability of victims to seek justice through the courts.[75] At the centre of this approach is the persistent assumption that men are the chief perpetrators of such offences, particularly those outside of the West/powerful

[68] Heathcote, 'Security Council Resolution 2242 on women, peace and security', p.380.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid. See also Estelle B. Freeman, *Redefining Rape*, (Cambridge, MA: Harvard University Press, 2013), pp.274-5.
[73] Heathcote, 'Security Council Resolution 2242 on women, peace and security', p.380.
[74] Ibid.
[75] Ibid.

states, while 'deflecting attention from the inadequacies of laws in peacetime states in prosecuting, preventing or creating protection from sexual violence.[76] The focus now moves to a consideration of two other Resolutions which, while they do not directly address the operations of the courts, provides significant insights into UN culture contextualising their operations and practices.

(b) UNSCR 1889 and 2122

Both UNSCR 1889 (2009),[77] a product of Viet Nam's presidency (constructed 5 days after Resolution 1888)[78] and 2122 (2013),[79] drafted by the UK alongside Spain, the president of the Council in October that year,[80] add what Heathcote describes as 'a model of substantive participation within the women, peace and security framework.'[81] The former, for example, repeats the call from Resolution 1325 for greater representation of women in decision-making roles in conflict prevention, resolution and peacebuilding while also, crucially, providing a recognition that a number of practical factors work to obstruct women's representation and participation.[82]

The problem for this thesis is that Resolution 1889 refers to the use of indicators, specifically in UN missions, as a way of measuring the implementation of strategies relating to the women, peace and security framework. Heathcote cogently points out that, in practice, the use of such indicators, 'which are never in and of themselves neutral or

[76] Ibid.
[77] UN Security Council, Security Council Resolution 1889 (2009) [on women and peace and security], 5 October 2009, S/RES/1889: http://unscr.com/en/resolutions/1889, (accessed 29 August 2020).
[78] Gina Heathcote, 'Feminist Politics And The Use Of Force: Theorising Feminist Action And Security Council Resolution 1325', *Socio-legal Review*, (2011), (7), 23-43, pp.27; 29-30.
[79] UN Security Council, Security Council resolution 2122 (2013) [on women and peace and security], 18 October 2013, S/RES/2122 (2013): https://www.refworld.org/docid/528365a44.html, (accessed 29 August 2020).
[80] 'Open Debate and Draft Resolution on Women, Peace and Security', What's in Blue, 12 October 2015: https://www.whatsinblue.org/2015/10/open-debate-and-resolution-on-women-peace-and-security.php#, (accessed 22 June 2020).
[81] Heathcote, 'Security Council Resolution 2242 on women, peace and security', p.380.
[82] Ibid.

objective tools,'[83] runs the risk of creating a landscape where the numbers of women count. Consequently, the more qualitative assessment of efforts to judge whether due attention is given under these initiatives to counter 'the substantive and structural disadvantages that hinder women's full participation within any community' are overlooked.[84]

An assessment of the impact of UNSCR 1889 must be that it fails to engage with the different needs of diverse and varied groups of women, including those involved in the proceedings of the international courts. Simply concentrating on the representation of a number of women within decision-making organs cannot ensure that women's and minority needs are given proper priority in the considerations of those organs, including the international courts. Heathcote points out that it is worth noting in relation to this aspect that, collectively, the resolutions typically address the need to consult with women's civil society, women's groups and women's organisations, 'rather than promoting women as decision makers or as members of decision-making groups.'[85]

In contrast, UNSCR 2122 can be argued as symbolising a turning point by acknowledging the diversity of women's right and capacity for involvement in post-conflict environments.[86] This aspect of the Resolution's provisions is particularly significant because it possesses the potential to mark a shift within the UNSC in terms of its attitudes towards its work on women, peace and security by providing a gender perspective that challenges gender essentialism. This point is compounded by the Resolution's request that the Secretary-General's Special Envoys and Special Representatives to UN missions should consult diverse groups of women's organisations and women's leaders, in order to reflect the views of women from socially and

[83] Ibid, p.381.
[84] Ibid.
[85] Ibid.
[86] Ibid.

economically disadvantaged backgrounds. These requirements can, as Heathcote points out, constitute significant indicators of change, presenting an opening for those women who feel they are unrepresented or even misrepresented 'within [the] international security discourse to mobilise around.'[87]

Linked to this point, and of particular importance to the considerations of this thesis, is the shift to challenge the gendered assumptions present within the UNSC, by acknowledging the need to consult a diversity of women's groups, thereby presenting new opportunities for women's voices to be heard. Resolution 2122, calls explicitly for an 'implementation shift' in the Council's work, rather than a reliance simply on rhetorical exhortations.[88] Together with other provisions listed within it, that Resolution challenges the UN to address gender essentialism. It promotes a reductive stance that 'assumes problematic gender norms' as factors relevant only to 'poor, disadvantaged and conflict societies', failing to recognise it as 'a component of international and/or powerful states structures.'[89] This dimension is a direct and explicit acknowledgement of the complex issues surrounding the choices made by the ICTY, the ICTR and the ICC in relation to prosecuting rape as torture, for example.

Despite these apparently progressive developments, including the call for implementation strategies, UNSCR 2122 does also continue to perpetuate a gendered framework. As with the other resolutions examined here, its critics reflect that it does discuss, more explicitly, the challenges facing international bodies when providing for gender equality, gender perspectives, gender balance and gender mainstreaming. However, 'when this is translated to strategies for action', its emphasis remains focused on simply an increase in numbers of female participants in various aspects of peacekeeping

[87] Ibid.
[88] Ibid, p.382.
[89] Ibid.

(including – at least implicitly – the courts), and not on the more qualitative dimension that Heathcote identified as being essential.[90] This focus works not only to eradicate the diversity of women's experience and needs, but to undermine 'women's existing contributions to peace and security – locally, regionally and internationally'.[91] These are effectively 'rendered as doubly invisible and unimportant often because they are located outside of formal decision-making arenas.'[92]

Overall, UNSCR 1889 (2009), alongside 2122 (2013), do provide what Heathcote describes as a 'more robust understanding' of what was required to promote women's involvement in the reconstruction of post-conflict landscapes.[93] With its focus on participation rather than protection or prevention, the objective of Resolution 1889 was to address the need to provide structures to enable women's formal participation in a range of initiatives.[94] However, gender and cultural essentialism continue to be the dominant trope. The Resolutions do shift away from the protectionist perspective so visible in UNSCR 1325, towards a more overt gender-balanced expectation of inclusion of contribution by women to peace and security initiatives. However, the quantitative rather than the qualitative nature of such contributions leaves the emphasis on protection substantially unchallenged when it comes to implementation strategies.[95]

Despite the identified shortcomings, Heathcote and Laura Shepherd lay stress on the positive aspects of both UNSCR 1889 and 2122.[96] They view these resolutions as representing a genuine attempt to move away from gender essentialism within the UN,

[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Heathcote, 'Participation, Gender and Security', p.54.
[94] Ibid.
[95] Ibid, pp.56-7.
[96] Heathcote, 'Participation, Gender and Security', pp.57-8; Laura J. Shepherd, *Gender, UN Peacebuilding and the Politics of Space: Locating Legitimacy*, (Oxford: Oxford University Press, 2017), pp.78-9.

towards an acknowledgement that the danger of adopting a uniform approach 'overlooks the complex interaction of power relationships that inhibit women's participation'.[97]

(c) UNSCR 2467

Despite the hopes that a new spirit is discernible in UNSC thinking, with all the implications that should have for that in turn being passed on to bodies like the courts, the ability of the existing Security Council Resolutions to address issues surrounding the ongoing perpetration of sexual violence remains open to question. This is underlined by the appearance of UNSCR 2467 in April 2019.[98] Led by Germany, the Resolutions original intention was to provide a 'survivor-centred' approach with the ability to prevent and respond to sexual violence in conflict. As such, it addressed a series of areas that were deemed controversial for three permanent members of the Security Council - the US, China and Russia. The areas included a responsibility for UN related agencies, including the international courts, to take into consideration the sexual and reproductive health of sexual violence victims (including LGBTI victims as a vulnerable group). The Resolution also called for the establishment of a working group on sexual violence in conflict, with the conclusions of that group to be passed to the International Criminal Court (ICC). Once again, the record of its passage and the changes to its original draft are informative of the challenge still remaining to the achievement of a gender balanced approach, both in theory and implementation.

[97] Heathcote, 'Participation, Gender and Security', p.57.
[98] UN Security Council, Security Council Resolution 2467 (2019) [on women and peace and security], 29 April 2019, S/RES/2467: https://www.securitycouncilreport.org/un-documents/document/s-res-2467.php, (accessed 29 August 2020).

Indeed, the text relating to sexual and reproductive health in the original draft was eventually removed 'due to the threat of a US veto'.[99] Global Justice has referred to the omission from the final version as 'a shameful concession to US hegemony.'[100] The call to establish a UNSC working group on sexual violence in conflict in the original German draft also proved contentious. This recommendation was ultimately excluded from the Resolution following disapproval from China and Russia. Asserting its dissatisfaction, China stated that 'it is important to have extensive discussions well in advance' before creating 'special mechanisms'.[101] Russia, on the other hand, declared its concern 'about the efforts to increase the number of bureaucratic United Nations bodies in order to create the appearance of robust activity'.[102] Linked to this challenge, the proposed language reflecting on the role and purpose of the ICC was also disputed. Early drafts of the Resolution described how 'the fight against impunity for crimes of international concern against women and girls' had been supported and 'strengthened through the work of the International Criminal Court, ad hoc international and mixed tribunals.'[103] The US, which has taken a strong stance against the ICC, protested the reference to the Court within the Resolution, so it was excluded as a part of the will to combat impunity. Instead, UNSCR 2467 simply 'acknowledges the inclusion of sexual and gender-related crimes among the most serious crimes of international concern in the Rome Statute of the International Criminal Court'.[104]

[99] 'In Hindsight: Negotiations on Resolution 2467on Sexual Violence in Conflict', What's In Blue, 2 May 2019: https://www.whatsinblue.org/2019/05/in-hindsight-negotiations-on-resolution-2467-on-sexual-violence-in-conflict.php#, (accessed 14 July 2020).
[100] Press Release, 'UN Security Council Adopts Resolution 2467', Global Justice Center, 23 April 2019: https://globaljusticecenter.net/press-center/press-releases/1117-un-security-council-adopts-resolution-, (accessed 14 July 2020). A reference to resolution 2106 was retained in a preambular 'In Hindsight', What's In Blue.
[101] 'In Hindsight', What's In Blue.
[102] Ibid.
[103] Ibid.
[104] UNSCR 2467.

In subsequent conversations, France, Belgium, the UK and South Africa described their concerns about the exclusion of such language. South Africa, for example, stated '[o]n the one hand, the text calls for a survivor-centered approach, while on the other hand it is denying survivors essential sexual and reproductive health services when they need them the most.'[105] Significantly for the theme of this chapter, South Africa went on to make that point that '[t]he Council is therefore telling survivors of sexual violence in conflict that [UN member] consensus is more important than their needs'.[106]

In the course of the debate, additional changes were made to the Resolution 2467 to secure the compliance from China and Russia, in the shape of the Informal Expert Group on Women, Peace and Security (IEG, 2016-present), the first official Security Council working group on women, peace and security. For example, though the Resolution 'acknowledges' the work of the IEG, it does not 'welcome' it, as did the previous text.[107] Though the Resolution indicates that the Council would consider material, examination and recommendations from the IEG, 'it stops short of considering measures to implement them', as had earlier been the case.[108]

Likewise, during the debate, reference to the UNSC's 'intention to integrate considerations of sexual violence' committed in (post-)conflict 'in the work of relevant counter-terrorism sanctions regimes' was excluded from the draft resolution.[109] This omission is particularly interesting given that earlier in Resolution 2242 (2015), the UNSC called 'for the greater integration by Member States and the United Nations of their agendas on women, peace and security, counter-terrorism and countering-violent

[105] 'In Hindsight', What's In Blue.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.

extremism which can be conducive to terrorism'.[110] In the meeting of the UNSC on Resolution 2242 in 2015, the UN Secretary-General Ban Ki-Moon (2007-2016) had asserted that '[a]t a time when armed extremist groups place the subordination of women at the top of their agenda, we must place women's leadership and the protection of women's rights at the top of ours'.[111]

It is important to note that the exclusion of such a provision from Resolution 2467 is not related to concerns raised by feminists like Fionnuala Ní Aoláin regarding the shift to integrate the women, peace and security agenda into strategies for counter-terrorism and countering violent extremism.[112] Rather, these revisions reflect the anxieties shared by China and Russia regarding the growth of the women, peace and security agenda and the potential this possesses for bringing aspects of that agenda within the remit of the international courts because of a promotion of changes in international law.[113]

In sum, the resolutions examined in this chapter are deeply fragmented in their approach to addressing rape and other related crimes committed in conflict scenarios as well as when dealing with post-conflict peacekeeping. This fragmentation has real implications for the resultant culture framing the work of bodies like the specialist international criminal tribunals and courts. It also works to underline the limitations of the UN in terms of its ability to sponsor change. This criticism is made plain when we consider the various UNSCRs that have been created to address women, peace and security. Though well-intended, these Security Council Resolutions typically reflect the foreign policy

[110] UN Security Council, Security Council Resolution 2242 (2015) [on women and peace and security], 13 October 2015, S/RES/2242: https://www.refworld.org/docid/562097f44.html, (accessed 29 August 2020), para 11.
[111] Heathcote, 'Security Council Resolution 2242 on women, peace and security', p.386.
[112] For more information, see ibid.
[113] It should be noted that despite disappointment with the revisions and omissions described, aspects of Resolution 2467 have been praised. Though critical of the changes, Pramila Patten, Special Representative on Sexual Violence in Conflict, has stated that the Resolution is 'a step in the right direction'. 'In Hindsight', What's In Blue.

agenda not only of the State holding the presidency of the Council, but those states with a veto.[114] Where consensus on the Council can be achieved only by negotiation and compromise, the resulting outcome is that Resolutions in their 'wording and framings' can only, 'at best reflect what it was possible to agree on at the time.'[115]

Final Thoughts

This chapter has identified that within the UN, hypermasculinity continues to define the culture of that organisation and its general attitude towards conflict-perpetrated rape. As the previous chapters have revealed, it is essential to take that culture into consideration when examining the prosecution practices of the specialist international tribunals and courts. Attempts to establish a gender-balance to frame the work of those courts fail to go sufficiently far to amount to a challenge to the traditional heteronormative framework that has been shown to persist in modern international law and the strategies for its application within the courts. In order to address this problem, the theoretical scope of these peace and security resolutions must be broadened. To achieve this objective and enable later progression to a more nuanced comprehension of gender identity, including non-binary, both feminine and masculine experiences and perspectives must be included in these instruments.[116] The role played by gender essentialism, prioritising the influence of masculine norms regarding violence committed against women, needs to be acknowledged explicitly if progress is to be made in developing a lexicon for rape that is not simply a continuation of entrenched cultural attitudes.[117] It is important to challenge toxic masculinity and integrate both men and boys into agendas programmes aimed at tackling

[114] Heathcote, 'Feminist Politics And The Use Of Force', p.27.
[115] Heathcote, 'Security Council Resolution 2242 on women, peace and security', pp.382-3.
[116] Wright, *Masculinities, conflict and peacebuilding*, pp.39-41
[117] Ibid, p.40.

violence against women.[118] In parallel, how men are affected by inequitable gender norms, which frame them primarily as perpetrators of rape, not victims, must be included.[119] As part of this process, a new comprehension of what constitutes masculinity needs to be built, which has implications for a less stereotyped femininity. Women's roles as perpetrators must also be acknowledged by the international courts even if it occurs at a much lower rate. It is only where this dimension is included that a proper appreciation of the realities of conflict-perpetrated rape in modern conflicts can be achieved and we can genuinely achieve a gender-neutral approach to conflict-perpetrated rape in international law.

Practical steps will also need to be taken that involve the courts and court personnel as well as other UN and UN-related personnel. Improved coordination and uniformity, for example, is essential in that such interventions are, relatively speaking, usually short-term and 'involve a variety of actors in different locations.'[120] It is equally important if outcomes from any training given, for example to court officials, are to be effectively measured and monitored through a process of independent collection of robust qualitative and quantitative data.[121] To date, there is no sign of such strategies being instituted, despite the continuing criticism from academic and legal professionals examining the area. As Goetz points out, if the women, peace and security agenda is to fulfil its advertised purpose, it needs to be repurposed so that it 'is not just about changing the players at negotiations, it is about changing the nature of peace processes' – something of which the UN itself acknowledges the courts to be an intrinsic part.[122] By failing to challenge or redefine what are understood as acceptable gender norms, the UN instead entrenches hypermasculinity

[118] Fionnuala Ní Aoláin, 'Women, Security, and the Patriarchy of Internationalized Transitional Justice', *Human Rights Quarterly*, (2009), 31(4), 1055-85, p.1060.
[119] Wright, *Masculinities, conflict and peacebuilding*, pp.18-29; 39.
[120] Jackie Kirk and Suzanne Taylor, 'UNSCR 1325', *Forced Migration Review*, (2007), 27, 13-4, p.13.
[121] See generally Wright, *Masculinities, conflict and peacebuilding.*.
[122] WPP, 'Conciliation Resources and Kingdom of the Netherlands', p.4.

within their peacekeeping missions, leaving the military traditions that support hypermasculinity largely undisturbed. But, as Judith Gardam and Dale Stephens point out, the responsibility lies not just with these institutions. Feminist commentators have a responsibility also for engaging with the military to enable 'further meaningful conversation'.[123]

Conclusion

Historically, the UN, as a male-dominated, hypermasculine institution, has overlooked acts of rape committed in (post-)conflict territories, exhibiting a 'boys will be boys' attitude. This display undoubtedly affected the operations of the ICTY, the ICTR and the ICC. Indeed, it seems unlikely that had the UN taken a more serious response to charges of rape committed by its deployed peacekeepers, for example, then the ICTY and the ICTR would not have initially ignored the accounts of mass rape committed during the respective conflicts in the former Yugoslavia and Rwanda.

Following global criticism, the UN has attempted to make amends via the introduction of various UNSC women, peace and security resolutions, which prohibit rape. On the one level, these resolutions have been transformative. They have worked to address the use of rape as a weapon of war and the understanding of rape as a serious war crime, which has helped identify that women and girls are disproportionately affected by such crimes. On another, the emphasis on achieving consensus through compromise, as with the operations of the Security Council, ensures that in practice, there remains a lack of gender perspective in UN thinking. As such, its instruments continue to reinforce the hypermasculinity of leading officials and states, because they cannot be challenged

[123] Judith Gardam and Dale Stephens, 'Concluding Remarks: Establishing Common Ground Between Feminism and the Military', in Heathcote and Otto (eds), *Rethinking Peacekeeping*, 265-79, pp.278-9.

effectively by the power structures within the body. What remains entrenched in UN culture is the idea that men are the natural perpetrators of rape while women are the victims. The lack of agency accorded to women indirectly ensures that male-male rape is not readily acknowledged as an issue needing to be addressed by the courts as well as making it difficult for female-perpetrated rape to be considered. The UN does now acknowledge in its rhetoric that a relationship exists between patriarchal ideas of masculinity and the ways in which conflict-perpetrated rape needs to be understood if advances are to be made in establishing a more robust lexicon for use in conflict-perpetrated rape prosecutions. This development has particular importance if the ambitions first outlined in UNSCR 1325 of achieving justice for all (including women) as part of a post-conflict reconstruction of states and societies. International law needs to develop a more robust lexicon of rape, in order to acknowledge such understandings.

Conclusion

As a crime, rape has been reconceptualised over time and this thesis has provided a revealing survey of the historical context relating to this development, indicating how events and attitudes affected considerations of how rape should be prosecuted in international law. At the domestic level, it was previously considered a gendered property crime perpetrated against the man who formally or effectively possessed the women, before being accepted as gendered interpersonal violence, where the offence is committed against the victims of that violence. Led by Western thinking, many states now formally identify rape in law as a form of gender-neutral interpersonal violence. Mirroring this shift, modern international law now understands conflict-perpetrated rape in similar terms. Indeed, the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993-2017) and the International Criminal Tribunal for Rwanda (ICTR, 1994-2014) and the International Criminal Court (ICC, 2002-present) each broadly defined rape as a gender-neutral crime committed against the individual in their own right.

In theory, this development should encourage prosecutions of conflict-perpetrated rape and it is to be welcomed that this has, to an extent, happened. However, it should also serve to promote prosecutions committed by and against either gender in international law. In practice, this has yet to be the case. In cases of male-female rape, for example, it is commonplace for prosecutions to bring a charge only for an act of rape. On occasion, that charge is accompanied in the prosecution case by another headline offence, such as an outrage upon human dignity or a crime of torture**.** Male-male rape, on the other hand, is regularly either overlooked by the prosecution when drawing up the charges, or is

prosecuted as something other than rape – for example, torture. Female-perpetrated rape is largely ignored.

In considering the reasons why international law has not responded fully to the challenge of engaging with a gender-neutral approach to conflict-perpetrated rape, the thesis demonstrated the significance of including the cultural legacies of how rape has been and continues to be understood. These outcomes in international law have been shown to be linked to the prevalence of traditional heteronormative understanding of rape in many different cultures across the globe, where men are held primarily as perpetrators of rape and women as victims.[1] Indeed, female victims continue to be described in media commentary, and even by judges in some jurisdictions, as events provoked or instigated by them, because of acts to make their physical presence visible by wearing provocative clothing.[2] It is unsurprising, then, that despite more cases of rape being reported in 2019, domestic records from around the world show that prosecution levels remain relatively low and the percentage of successful outcomes for trials have stayed persistently low.[3]

[1] Fionn Hargreaves, 'Male rape survivors tell of their battle to have their voices heard after being told "men are the attackers, women are the victims"', *The Daily Mail*, 15 April 2017: https://www.dailymail.co.uk/news/article-4409806/Male-rape-victims-tell-battle-voices-heard.html, (accessed 20 August 2020).

[2] Lin-dsey Bever, 'The persistent myth that revealing clothing leads to rape', *The Washington Post*, 10 January 2018: https://www.washingtonpost.com/news/worldviews/wp/2018/01/10/the-persistent-myth-that-revealing-clothing-leads-to-rape/, (accessed 20 August 2020). See more generally Theresa L. Lennon Sharron J. Lennon and Kim K.P. Johnson, 'Is Clothing Probative of Attitude or Intent - Implications for Rape and Sexual Harassment Cases', *Law & Inequality: A Journal of Theory and Practice*, (1993), 11(2), 391-415.

[3] Though Sweden reported higher conviction rates rape in 2019 following legal reform, India, England and Wales and Canberra, Australia have reported low figures. See Caelainn Barr, 'Why are rape prosecutions at a 10-year low?', *The Guardian*, 12 September 2019: https://www.theguardian.com/society/2019/sep/12/why-are-rape-prosecutions-at-a-10-year-low-england-wales, (accessed 21 August 2020); 'Low rape convictions alarming', *Deccan Herald*, 22 December 2019: https://www.deccanherald.com/opinion/second-edit/low-rape-convictions-alarming-787905.html, (accessed 21 August 2020); Clare Sibthorpe, 'Canberra's low rape prosecution rate shows "monumental failure" of justice system, services say', *ABC News*, 20 March 2019: https://www.abc.net.au/news/2019-03-21/5-per-cent-of-rape-reports-to-act-police-progress-to-charges/10903578, (accessed 21 August 2020).

These cultural attitudes towards rape continue to impact the culture within the specialist international courts because of the cultural realities obtaining there. In 2019, Lesley Abdela recalled a discussion she had with Judge Shireen Fisher regarding her experience with the ICTY and the Special Court for Sierra Leone. Judge Fisher reflected that in cases of where women claimed to have been rape by men, the initial stance of fellow female judges was one of belief. By contrast, fellow male judges expressed disbelief. While anecdotal, this perspective on the default attitude of judges within the international courts underlines the ongoing impact of national cultural legacies in international law.

This perpetuation of traditional conceptualisations of rape demonstrates the powerful legacy of the past and justifies the emphasis placed on this dimension within the thesis. At this point, a remark made by astronomer Carl Sagan can be usefully invoked: 'you have to know the past to understand the present.'[4] Finding value in his comment, I decided to look at the terms used to categorise rape in international law through a historico-legal and liberal feminist lens. Using these perspectives, a critical examination has been undertaken of the ways in which these terms have been understood and applied by the ICTY, the ICTR and the ICC. On that basis, it has been able to determine whether (and how far) they are being used in a way that reflects the modern gender-neutral definitions of rape created by these specialist international courts. This analysis established that not only do traditional understandings of rape continue to linger in the use of the terms within these bodies, but that the scholarship that has sought to critique them has failed to advance the debates or the practices. Instead, the deliberations on international law and its contextualising culture has itself remained chained to cultural legacies which perpetuate a

[4] Symeon C. Symeonides, *Choice of Law*, (Oxford: Oxford University Press, 2016), p.45.

will to interpret rape from certain perspectives which undermine attempts to further gender-neutral understandings.

Starting with the term 'sexual violence', this thesis has shown that in defending the categorisation of rape under this heading, feminists like Anne Cahill, Catharine MacKinnon and Monique Plaza have largely responded defensively to Foucault's idea that rape should be stripped of its associations with the sexual dimension.[5] Foucault's original argument that rape should be categorised legally as a form of violence only, caused offence when he notably compared rape to a punch in the nose.[6] The subsequent feminist discussions of his ideas have substantially remained rooted in that offence, and as such, rather than taking the discussion forward, the debates put forward by feminist scholarship in general have largely been circular and limited in their scope by a will to preserve a gendered special status for women. For example, they focus on fixed traditional gendered understandings of masculine and feminine bodies and (social) roles as well as the performance of certain acts. They continue to characterise rape (in line with traditional conceptualisations of the crime) as being committed by aggressive men against passive women, excluding female-perpetrated rape. Male-male rape is either ignored, sidelined or diminished by this approach in feminist scholarship. Where male rape victims are acknowledged within these debates, for example, their experience is regularly likened to that of the female experience rather than being considered as having an independent

[5] Ann J. Cahill, 'Foucault, Rape and the Construction of the Feminine Body', *Hypatia*, (2000), 15(1), 43-63; Ann J. Cahill, *Rethinking Rape*, (Ithaca and London: Cornell University Press, 2001); Catharine A. MacKinnon, *Towards a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989); Monique Plaza, 'Our Damages and Their Compensation. Rape: The Will Not to Know of Michel Foucault', *Feminist Issues*, (1981), 1(2), 25-35; Monique Plaza, 'Our Costs and Their Benefits', in Diana Leonard and Lisa Adkins (eds), *Sex in Question: French Materialist Feminism*, (London and Bristol, PA: Taylor & Francis, 2005), 178-89; Michel Foucault, 'Confinement, psychiatry, prison', in L. D. Kritzman (ed.), *Politics, philosophy, culture: Interviews and other writings, 1977-1984*, (translated, Alan Sheridan *et al.*), (New York, NY: Routledge, 1988).
[6] Foucault, 'Confinement, psychiatry, prison', p.202.

reality. This thesis has sought to include an understanding that such perspectives can not only work to damage a male victim's sense of masculine identity, but work to reinforce the social stigma of rape by making it something pertaining to homosexuality, which in itself is frequently defined as having a feminine character. Similar problems are found in the application of, and circular discussions regarding the term 'gender-based violence'.

Turning to the concept of dignity, this thesis uncovered a different set of challenges when exploring the debates around the categorisation of conflict-perpetrated rape under this heading. Even where the challenges of cultural relativism have been responded to, scholars like Camilla Barker often effectively overlook the full implications of the etymological contexts to the languages used in the current lexicon.[7] As such, its deep-rooted relationship with the concept of honour, and the challenges this relationship continues to present to modern-day rape prosecutions in international law remains generally unexplored. This gap within the analysis is particularly damning given that conflict-perpetrated rape continues to be perceived in many cultures as a harm that damages the honour of the family (understood in masculine province) rather than the victim (which in such communities is identified as female).

When examining the usefulness of categorising rape as a form of torture, including the question of whether this heading frames rape as a serious crime, feminist scholars have been more considerate of the historical dimension. MacKinnon, Deborah Blatt, Karen Engle and Alice Edwards, for example, have examined the concept of torture from both a historical and contemporary perspective.[8] They have analysed torture in the context of the

[7] Camilla Barker, *Dignity in International Human Rights Law*, (London: International Write for Rights Movement, 2011); Deborah Blatt, 'Recognizing Rape as a Method of Torture', *Review of Law and Social Change*, (1992), 19(821), 71-85.
[8] Catharine A. MacKinnon, *Are Women Human?: And Other International Dialogues*, (Cambridge, MA and London: Belknap Press of Harvard University Press, 2006); Blatt, 'Recognizing Rape as a Method of Torture'; Karen Engle, 'Feminism and Its (DIS)contents: Criminalizing Wartime Rape in Bosnia and

political private/public dichotomy debate and considered where conflict-perpetrated rape fits within that discussion. The challenge for this thesis is that their analysis focuses primarily on male-female rape, and the extent to which women, as the main targets of rape, benefit from this development. Little attention has been paid to male-male rape and the implications this categorisation has for these victims. Again, female-perpetrated remains largely overlooked.

Of course, the problems associated with the ongoing perpetuation of traditional heteronormative understandings of rape in international law are not limited to the terms used to categorise the offence. As demonstrated in the final chapter, a key challenge relates to the cultural attitudes of bodies like the United Nations (UN, 1945-present) and the ways in which such attitudes provide an enabling context for the perpetuation of traditionally gendered attitudes. The central force behind the creation of the ICTY, the ICTR and the ICC, the UN itself has undoubtedly influenced the cultural framework within which the operations within the courts continue. The final chapter underlined in particular the lack of gender-balanced training provided for court personnel, including their sitting judges. The UN has continued to be male dominated, and has routinely been accused of promoting a hypermasculine culture[9] and, in turn, an associated culture of impunity towards rape among other related crimes committed by its personnel since the 1990s.[10] In this context, it seems fair to hold the UN substantially accountable for the ongoing perpetuation of traditional conceptualisations of conflict-perpetrated rape within these international

Herzegovina', *American Journal of International Law*, (2005), 99(4), 778-816; Alice Edwards, *Violence Against Women under International Human Rights Law*, (Cambridge: Cambridge University Press: 2011).

[9] Elizabeth F. Defeis, 'U.N. Peacekeepers and Sexual Abuse and Exploitation', *Washington University Global Studies Law Review*, (2008), 7(2), 185-214, p.191; Carol Allais, 'Sexual Exploitation and Abuse by UN Peacekeepers: The Psychological Context of Behaviour Change', *Scientia Militaria, South African Journal of Military Studies*, (2011), 39(1), 1-15, p.3.

[10] Victoria Sanford, Katerina Stefatos and Cecilia Salvi, 'Introduction', in Victoria Sanford, Katerina Stefatos and Cecilia Salvi (eds), *Gender Violence in Peace and War: States of Complicity*, (New Brunswick, NJ: Rutgers University Press), 1-18, pp.2-3.

specialist courts. This enablement helps to explain to a significant extent the inconsistencies in practice in rape prosecutions under their remit, despite the rhetorical assurances of gender-neutral thinking in international law.

On balance then, to achieve an inclusive, modern gender-neutral understanding of rape in international law, this thesis concludes that not only do the terms used to categorise rape need to be revisited as per the recommendations outlined in Chapters 5-7. Also, and with a focus firmly on the UN, the traditional cultural attitudes need to be addressed and challenged, because as this thesis has revealed, these continue to influence powerfully operations within the courts. Traditional gender constructs which seemingly still influence legal thinking on rape must be revisited or rejected at the highest levels within the UN itself. But this does need to go further. While throughout this analysis it is plain that traditional social and biological conceptualisations of the masculine and the feminine have been strongly challenged by gender experts and feminist scholarship and activists, this has proved to be lacking in genuinely innovative thinking.[11] More needs to be done by scholars to establish in international law a nuanced comprehension of gender identity, including non-binary ones, for use in future proceedings. To achieve this objective, guidelines must be introduced which explain how conflict-perpetrated rape is characterised by its potential for use as a tool of power *by* and *against* individuals because they are considered representative of the other side in an engagement.[12] This emphasis on power could potentially steer the conversation beyond the persistent cultural and legal conceptualisation

[11] See for example, Gayle Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex', in Pamela Nicholson, *The Second Wave: A Reader in Feminist Theory*, (New York, NY: Routledge, 1997), 27-62; Sarah Ben-David and Ofra Schneider, 'Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance', *Sex Roles*, (2005), 53(5/6), 385-99

[12] Sandesh Sivakumaran discusses how the power model could be broadened to address other types of rape beyond the female-male paradigm. See Sandesh Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', *Human Rights Quarterly*, (2005), 27(4), 1274-306, pp.1281-2.

of women as permanent victims and men as perpetrators, and instead focus attention on the motivation and individual harm caused by rape.

As part of this process, toxic essentialist standards, which deny women sexual autonomy and frame men as natural aggressors, need to be broken down and deconstructed to prevent women from being valued strictly as targets of rape in war, and so encouraging their abuse.[13] The impact of essentialist standards on men needs to be recognised and excluded, given that such understandings work to encourage male-male rape as part of an attempt to feminise men and deprive them of both an individual masculine identity and their community status. As conflicts show in, amongst others, Sierra Leone, the Democratic Republic of Congo (DRC), the former Yugoslavia, and Rwanda, men and women are capable of being both victims and perpetrators of rape. Legal languages do have a cultural function, in that they can introduce new terms with their accompanying values into everyday language.[14] However, the tendency to promote legal precedents encourages a continuity of historical legal terms. An emphasis on maintaining stability must also be accepted as having a downside. The temptation to conserve a linguistic status quo promotes persistence of traditional understandings reflecting obsolete cultural values, as demonstrated in the international courts. To discuss rape strictly in terms of traditional understandings of masculine and feminine bodies and (social) functions within communities is to take a position that is no longer considered fit for purpose in law. Other elements of rape, which have been understood as part of or in accordance with these gender constructs, must be reconsidered. For example, the role played by power in rape remains

[13] See for example, Fionnuala Ní Aoláin, 'Women, Security, and the Patriarchy of Internationalized Transitional Justice', *Human Rights Quarterly*, (2009), 31(4), 1055-85, p.1060.
[14] See, for example, Heikki Mattila, *Comparative Legal Linguistics*, (Aldershot: Ashgate, 2007), p.60.

in line with hegemonic masculinity, particularly its expression as hypermasculinity when describing conduct which can be considered normal by men in positions of authority.

Overall, there is an urgent need for feminist scholarship to be less defensive when discussing the genuine and substantial need for ensuring the protection of women in conflict-affected regions, enabling them to open up the debate to a more gender-neutral discussion. Without changes of perspective, a feminist hostility to such a development risks continuing the ghettoization of women as the only 'real' victims of rape, thereby dismissing the validity of male-male rape in its own right while also failing to recognise female-perpetrated rape victims. Substantiation for this point is partially provided in what have become the well-worn discussions on the gendered nature of rape, which largely differ only with the fresh incidents included, rather than as a result of a new approach to the material. Work on female-perpetrated or male-male rape continues to be largely excluded from the wider trope.[15]

The thesis limited itself to a focus on conflict-perpetrated rape in international law. However, by invoking an interdisciplinary perspective, a number of wider issues have necessarily been touched on, including the significance of the legacy of cultural traditions on law and legal proceedings. The thesis has demonstrated their extensive influence, and done so in ways that underline the need for scholars and legal professionals to be aware of this dimension and how it affects developments both in legislative and in procedural reforms. Judgments need to be made about how far consciously to reject, as well as to

[15] Following the emergence of the #MeToo movement in 2018, claims have been made that male victims have been overlooked. Zoe Greenberg, 'What Happens to #MeToo When a Feminist Is the Accused?', *The New York Times*, 13 August 2018: https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html, (accessed 14 August 2020). Anna North, 'When the accused is a woman: a #MeToo story's lessons on gender and power', *Vox*, 14 August 2018: https://www.vox.com/2018/8/14/17688144/nyu-me-too-movement-sexual-harassment-avital-ronell, (accessed 26 March 2019).

invoke, that legacy when moving forward in responses to new challenges, including the need to accommodate responses to conflict-perpetrated rape involving a greater gender fluidity.

The in-depth investigations indicating the ongoing impact on definitions, prosecutions and prosecution outcomes in this area has implications for improving an understanding of other areas of international law and how it operates. It also provides a challenge for the UN to revisit how it deals with its peace and security mission overall. My article published during the progress of the thesis demonstrated that international responses to conflict-related rape, occurring as a factor during post-conflict reconstruction processes, is intrinsically linked to the responses of the international courts as manifested in prosecutions of conflict-perpetrated rape.[16] Normatively gendered cultural traditions must be challenged before significant change can take place in international law, to ensure that conflict-perpetrated rape is taken more seriously. There is real potential for change on the basis of a greater awareness amongst feminist scholars of the damaging consequences of gendered special pleading. On that basis, the focus of the scholarship could move towards creating pressure on the UN which it would not be able to evade. Within that, the opportunities for an improved lexicon of rape for use within the international courts would be significantly enhanced.

[16] Fiona Tate, 'Impunity, Peacekeepers, Gender and Sexual Violence in Post-Conflict Landscapes: A Challenge for the International Human Rights Agenda', *Law, Crime and History*, (2015), 5(2), 69-96.

Bibliography

Primary Sources

Table of Cases

European Court of Human Rights

Aydin v. Turkey, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997

Cyprus v. Turkey, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001

Extraordinary Chambers in the Courts of Cambodia

Prosecutor v. Kaing Guek Eav (alias Duch) (Judgment), Case File/Dossier No. 001/18-07-2007/ECCC/TC, ECCC, 26 July 2010

Inter-American Commission on Human Rights

Raquel Martí de Mejía v. Perú, Case 10.970, Inter-American Commission on Human Rights, 1 March 1996

Inter-American Court of Human Rights

Case of the Miguel Castro-Castro Prison v. Peru Judgment, Inter-American Court of Human Rights, November 25 2006

International Criminal Court

Decision on the appeals of the Prosecutor and Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 21 June 2016 entitled 'Decision on Sentence pursuant to Article 76 of the Statute', ICC, ICC-01/05-01/08 A2 A3, 8 June 2018

Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo (Judgment pursuant to Article 74 of the Statute), ICC-01/05-01/08, ICC, 21 March 2016

Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, (Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'), ICC-01/05-01/08 A, ICC, 8 June 2018

Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, ICC, 14 March 2012

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)); Order of the Court on Provisional Measures, ICJ, 13 September 1993

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), General List No. 118, ICJ, 18 November 2008

International Criminal Tribunal for Rwanda

Prosecutor v. Alfred Musema (Appeal Judgment), ICTR-96-13-A, ICTR, 16 November 2001

Prosecutor v. Alfred Musema (Judgment and Sentence), ICTR-96-13-T, ICTR, 27 January 2000

Prosecutor v. Augustin Bizimungu (Appeal Judgment), ICTR-00-56B-A, ICTR, 30 June 2014

Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, and Innocent Sagahutu (Judgment and Sentence), ICTR-00-56-T, ICTR, 17 May 2011

Prosecutor v. Augustin Ngirabatware (Judgment and Sentence), ICTR-99-54, ICTR, 20 December 2012

Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse (Appeal Judgment), ICTR-98-44-A, ICTR, 29 September 2014

Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse (Judgment and Sentence), ICTR-98-44-T, ICTR, 2 February 2012

Prosecutor v. Jean de Dieu Kamuhanda (Judgment and Sentence), ICTR-99-54A-T, ICTR, 22 January 2004

Prosecutor v. Jean-Paul Akayesu (Appeal Judgment), ICTR-96-4-A, ICTR, 1 June 2001

Prosecutor v. Jean-Paul Akayesu (Trial Judgment), ICTR-96-4-T, ICTR, 2 September 1998

Prosecutor v. Juvénal Kajelijeli (Judgment and Sentence), ICTR-98-44A-T, ICTR, 1 December 2003

Prosecutor v. Laurent Semanza (Appeal Judgment), ICTR-97-20-A, ICTR, 20 May 2005

Prosecutor v. Laurent Semanza (Judgment and Sentence), ICTR-97-20-T, ICTR, 15 May 2003

Prosecutor v. Mikaeli Muhimana (Appeal Judgment), ICTR-95-1B-A, ICTR, 21 May 2007

Prosecutor v. Mikaeli Muhimana (Trial Judgment), ICTR-95-1 B-T 550-1, ICTR, 28 April 2005

Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Elie Ndayambaje, (Judgment and Sentence), ICTR-98-42-T, 24 June 2011

Prosecutor v. Tharcisse Muvunyi (Judgment and Sentence), ICTR-00-55A-T, ICTR, 12 September 2006

Prosecutor v. Tharcisse Renzaho (Appeal Judgment), ICTR-97-31-A, ICTR, 1 April 2011

Prosecutor v. Tharcisse Renzaho (Judgment and Sentence), ICTR-97-31-T, ICTR, 14 July 2009

Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva (Appeal Judgment), ICTR-98-41-A, ICTR, 14 December 2011

Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva (Judgment and Sentence), ICTR-98-41-T, ICTR, 18 December 2008

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Anto Furundžija (Trial Judgment), IT-95-17/1-T, ICTY, 10 December 1998

Prosecutor v. Biljana Plavšić (Sentencing Judgment), IT-00-39&40/1-S, ICTY, 27 February 2003

Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić (Trial Judgment), IT-95-9-T, ICTY, 17 October 2003

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Trial Judgment), IT-96-23-T & IT-96-23/1-T, ICTY, 22 February 2001

Prosecutor v. Duško Sikirica, Damir Došen, Dragan Kolundžija, Dušan Fuštar, Nenad Banović, Predrag Banović and Duško Knežević (Second Amended Indictment), IT-95-8-PT, ICTY, 3 January 2001

Prosecutor v. Milan Martić (Judgment), IT-95-11-T, ICTY, 12 June 20 2007

Prosecutor v. Milomir Stakić (Trial Judgment), IT-97-24-T, ICTY, 31 July 2003

Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić and Zoran Žigić (Trial Judgment), IT-98-30/1-T, ICTY, 2 November 2001

Prosecutor v. Mladen Naletilić aka 'Tuta', Vinko Martinović aka 'Stela' (Trial Judgment), IT-98-34-T, ICTY, 31 March 2003

Prosecutor v. Momčilo Krajišnik (Appeal Judgment), IT-00-39-A, ICTY, 17 March 2009

Prosecutor v. Momčilo Krajišnik (Trial Judgment), IT-00-39-T, ICTY, 27 September 2006

Prosecutor v. Radoslav Brđanin (Appeal Judgment), IT-99-36-A, ICTY, 3 April 2007

Prosecutor v. Radoslav Brđanin (Trial Judgment), IT-99-36-T, ICTY, 1 September 2004

Prosecutor v. Ranko Češić (Sentencing Judgment), IT-95-10/1-S, ICTY, 11 March 2004

Prosecutor v. Stevan Todorović (Sentencing Judgment), IT-95-9/1-S, ICTY, 31 July 2001

Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić (Appeal Judgment), IT-96-21-A, ICTY, 20 February 2001

Prosecutor v. Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić (Trial Judgment), IT-96-21-T, ICTY, 16 November 1998

Special Court for Sierra Leone

Prosecutor v. Charles Ghankay Taylor, SCSL-03-1-T, SCSL, 18 May 2012

Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment), Case No. SCSL-04-15-T, SCSL, 2 March 2009

Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused), SCSL-04-16-T, SCSL, 20 June 2007

UN Committee against Torture

C.T. and K.M. v. Sweden, CAT/C/37/D/279/2005, UN Committee Against Torture, 17 November 2006

Mrs. Pauline Muzonzo Paku Kisoki v. Sweden, CAT/C/16/D/41/1996, UN Committee Against Torture, 8 May 1996

V.L. v. Switzerland, CAT/C/37/D/262/2005, UN Committee Against Torture, 22 January 2007

Table of International Instruments and Treaties

Charter of Fundamental Rights of the European Union, 26 October 2012

Convention on the Prevention and Punishment of the Crime of Genocide 1948

Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, International Committee of the Red Cross

Declaration of Brussels 1874

Geneva Convention 1864

Hague Convention 1907

Hague Convention 1899

International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949

International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949

International Committee of the Red Cross, Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

Organization of American States, American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969

Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994

Oxford Manual on the Laws and Customs of War on Land 1880

Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America 1785

UN Charter, 24 October 1945

UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984

UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979

UN General Assembly, Convention on the Rights of the Child, 20 November 1989

UN General Assembly, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975

UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966

UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966

UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948

UN General Assembly, Vienna Declaration and Programme of Action reaffirmed the UDHR and UN Charter. UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993

UN Security Council, Statute of the International Criminal Tribunal for Rwanda, 8 November 1994 (amended 13 October 2006)

UN Security Council, Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993 (amended 17 May 2002)

UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002

Select List of UN Documents

UN Reports

UN Glossary on Sexual Exploitation and Abuse: Thematic Glossary of current terminology related to SEA in the context of the UN, 24 July 2017, Second Edition

UN Human Rights Office of the High Commission, Sexual and gender-based violence in the context of transitional justice, October 2014

Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation', Office of the UN High Commissioner for Human Rights, (2012), 1-41

UN, Ten-year Impact Study on Implementation of UN Security Council Resolution 1325 (2000) on Women, Peace and Security in Peacekeeping: Final Report to the United Nations Department of Peacekeeping Operations, Department of Field Support, (2010)

UN, *Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000)*, (2002)

UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women*, 31 January 2002

UN High Commissioner for Refugees, Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations, (Geneva: UNHCR, 2001)

Panel on United Nations Peace Operations, Report of the Panel on United Nations Peace Operations, delivered to the Security Council and the General Assembly, U.N. Doc. A/55/305, S/2000/809, 21 August 2000

UN Division for the Advancement of Women Department of Economic and Social Affairs, *Sexual Violence and Armed Conflict: UN Response*, (1998)

UN Sub-Commission on the Promotion and Protection of Human Rights, Systematic rape, sexual slavery and slavery-like practices during armed conflict: final report / submitted by Gay J. McDougall, Special Rapporteur, 22 June 1998

Violence and Armed Conflict: United Nations Response, (UN Division for the Advancement of Women Department of Economic and Social Affairs: 1998)

UN Security Council Resolutions

UN Security Council, Security Council Resolution 2467 (2019) [on women and peace and security], 23 April 2019, S/RES/2467

UN Security Council, Security Council Resolution 2242 (2015) [on women and peace and security], 13 October 2015, S/RES/2242

UN Security Council, Security Council Resolution 2122 (2013) [on women and peace and security], 18 October 2013, S/RES/2122

UN Security Council, Security Council Resolution 2106 (2013) [on sexual violence in armed conflict], 24 June 2013, S/RES/2106

UN Security Council, Security Council Resolution 1960 (2010) [on women and peace and security], 16 December 2010, S/RES/1960

UN Security Council, Security Council Resolution 1889 (2009) [on women and peace and security], 5 October 2009, S/RES/1889

UN Security Council, Security Council Resolution 1888 (2009) [on acts of sexual violence against civilians in armed conflicts], 30 September 2009, S/RES/1888

UN Security Council, Security Council Resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820

UN Security Council, Security Council Resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325

Table of National Acts and Statutes

China Criminal Law 1979

Constitution of India 1950

Constitution of the Republic of Bulgaria 1991

Criminal Code, Cambodia 1956

Criminal Code, Germany 1998 (amended 2013)

Criminal Code of the Republic of Bulgaria 1968 (amended 2010)

Penal Code, Bosnia and Herzegovina 2003 (amended 2013)

Penal Code, India 1860

Penal Code, Socialist Republic of Bosnia and Herzegovina 1991

Sexual Offences Act 2003 (England and Wales)

USA, Georgia Criminal Code, Rape (amended 2016)

Military and Other Documents

Articles of War 1776 (US)

General Headquarters of the Army, General order No.20 1847 (US)

Lieber Code 1863 (US)

Judicial Records and Official Archives

Canadian National Archives, Ottawa

Council of Europe, Strasbourg

European Court of Human Rights, Strasbourg

European Union, Brussels and Strasbourg

Extraordinary Chamber in the Courts of Cambodia, Phnom Penh

Inter-American Court of Human Rights, San José, Costa Rica

International Criminal Court, The Hague

International Court of Justice, The Hague

International Criminal Tribunal for the former Yugoslavia, The Hague

International Criminal Tribunal for Rwanda, Arusha, Tanzania

International Military Tribunal, Nuremberg

International Military Tribunal for the Far East, Tokyo

International Committee of the Red Cross, Geneva

Ministry of Foreign Affairs, Netherlands, including WO=MEN Dutch Gender Platform, The Hague

National Research Council, Washington, DC

The National Archives, Kew, London

The North Atlantic Treaty Organization (NATO), Brussels

Organization of American States, Washington, DC

Special Court of Sierra Leone, The Hague

Supreme Court of India, New Delhi

United Nations, New York, NY

UN Committee Against Torture, Geneva

UN War Crimes Commission, The Hague

US Bureau of Citizenship and Immigration Services, Washington, DC

US Supreme Court, Washington, DC

Other Archives (including Online Repositories and Collections, National and International Organisations and Bodies)

African Union website, Addis Ababa

The Avalon Project: Documents in Law History and Diplomacy website, Yale University, New Haven, CT

Cornell Law School, Cornell University website

The Hague Hearing Centre website

Human Dignity Trust website

Human Rights Watch website

International Criminal Database

International Humanitarian Law Databases website

International Justice Monitor website

International Justice Resource Center website

Isis-WICCE, Kampala website

Legal Information Institute, Cornell Law School, New York, NY website

London School of Economics (LSE) Centre for Women, Peace and Security website

Medecins Sans Frontieres website

Ohio Humanities website

Oxford Public International Law website

Tampico, Mexico Archives in the Woodson Research Center website, Rice University, Houston, TX

Women's Initiatives for Gender Justice, The Hague, website

Newspapers and Periodicals

Courier Mail

Daily Mail

Daily Telegraph

Guardian

Independent

Japan Times

Metro

New York Times

The Times

Times of India

USA Today

Washington Post

Online Newspapers and Media Source

Al Jazeera*:* https://www.aljazeera.com/

AlterNet: https://www.alternet.org/

BBC News*:* https://www.bbc.co.uk/news

CNN*:* https://edition.cnn.com/

Eurozine: https://www.eurozine.com/

Foreign Affairs: https://www.foreignaffairs.com/

Global India: http://globalindia.eu/

HuffPost: https://www.huffpost.com/

Inter Press Service News Agency: http://www.ipsnews.net/

*New Internationalist***:** https://newint.org/

The Conversation: https://theconversation.com/uk

Thomson Reuters Foundation News: http://news.trust.org/

Vox: https://www.vox.com/

Books and Official Journals

Thelma Awori, Catherine Lutz, and Paban Thapa, Final Report: Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO, and UNMISS (2013)

LaShawn R. Jefferson 'In War as in Peace: Sexual Violence and Women's Status', in *Human Rights Watch: World Report 2004*, (New York, NY: Human Rights Watch, 2004)

Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission, Vol. IV, published for the UN War Crimes Commission by His Majesty's Stationery Office, London, 1948, (London: HMSO, 1948)

UN Secretary-General, Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse, 9 October 2003, ST/SGB/2003/13

UN Secretary-General, Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13

Secondary Sources

Books, Chapters, Articles and Other Published Sources

A

Emilia Aaltonen, 'Punching Like a Girl: Embodied Violence and Resistance in the Context of Women's Self-Defense', *Journal of International Women's Studies*, (2012), 13(2), 51-65

Maartje Abbenhuis, Christopher Barber and Annalise Higgins (eds), *War, Peace and International Order? The Legacies of the Hague Conferences*, (Abingdon: Routledge, 2017)

Lesley Abdela, 'Witness to History: A "Boots-on-the-Ground" Perspective. Fighting for Gender Balance and Gender Justice', *Britain and the Wider World*, (2016), 9(1), 116-31

Alex Adams, *Political Torture in Popular Culture: the Role of Representations in the Post-9/11 Torture Debate*, (London: Routledge, 2017)

Foluke Ifejola Adebisi, 'Where the Rubber Hits the Road: The Limitations of the Universalism vs Cultural Relativism Debate Impacting FGM Control in Nigeria', *NIALS Journal of Law and Gender*, (2015)

Shaheen Sardar Ali, *Conceptualising Islamic Law. CEDAW and Women's Human Rights in Plural Legal Settings; A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan* (New Delhi; UNIFEM, 2006)

Miranda Alison, 'Wartime sexual violence and women's rights', *Review of International Studies*, (2007), 33(1), 75-90

Linda Martín Alcoff, *Visible Identities: Race, Gender, and the Self*, (New York, NY: Oxford University Press)

Yavuz Selim Alkan, 'Feminist legal methods: Theoretical assumptions, advantages, and potential problems', University of Leicester School of Law Research Paper No. 13-12 (2013), 1-12

Carol Allais, 'Sexual Exploitation and Abuse by UN Peacekeepers: The Psychological Context of Behaviour Change', *Scientia Militaria, South African Journal of Military Studies*, (2011), 39(1), 1-15

Torbjørn Herlof Andersen, 'Speaking About the Unspeakable: Sexually Abused Men Striving- Toward Language', *American Journal of Men's Health*, (2008), 2(1), 25-36

Chiyuki Aoi, *Legitimacy and the Use of Armed Force: Stability missions in the post-Cold era*, (Abingdon: Routledge, 2011)

Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (introduction by Amos Elon), (New York, NY: Penguin Books, 2006)

Carmen M. Argibay, 'Sexual Slavery and the Comfort Women of World War II', *Berkeley Journal of International Law*, (2003), 21(2), 375-89

Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research', *Utrecht Law Review*, (2017), 13(3), 95-113

Aristophanes, *Lysistrata*, (translated, Douglass Parker), (London: Penguin Signet Classics, 2009)

Caterina E. Arrabal Ward, *Wartime Sexual Violence at the International Level: A Legal Perspective*, (Leiden, Netherlands: Brill Nihoff)

Kelly Dawn Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, (2003), 21(2), 288-349

Kelly Dawn Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', *American Journal of International Law*, (1999), 93(1), 97-123

Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, (The Hague: Kluwer Law International, 1997)

Sidney Axinn, *A Moral Military*, (Revised edition), (Philadelphia, PA: Temple University Press, 2009)

B

Mirko Bagaric and James Allan, 'The Vacuous Concept of Dignity', *Journal of Human Rights*, (2006), 5(2), 257-70

Alexandra Bagasheva, 'Introduction', in Farzad Sharifian, *Advances in Cultural Linguistics*, (Singapore: Springer Nature Singapore Ltd., 2017), 189-222

Catherine Baker, *The Yugoslav Wars of the 1990s*, (Palgrave: London, 2015)

Keith Michael Baker and Peter Hanns Reill (eds), *What's Left of Enlightenment?: A Postmodern Question*, (Stanford, CA: Stanford University Press, 2011)

Simon Baker, *Ancient Rome: Rise and Fall of an Empire*, (New York, NY: Random House, 2007)

Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, (New York, NY: Cambridge University Press, 2015)

Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law*, (Cheltenham: Edward Elgar, 2017)

Camilla Barker, *Dignity in International Human Rights* Law, (London: International Write for Rights Movement, 2011)

Lilian A. Barria and Steven D. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR', *International Journal of Human Rights*, (2005), 9(3), 349-68

Luís Roberto Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse', *Boston College International & Comparative Law Review*, (2012), 35(2), 331-93

Amy Barrow, 'UN Security Council Resolutions 1325 and 1820: constructing gender in armed conflict and international humanitarian law', *International Review of the Red Cross*, (2010), 92(877), 221-34

Katherine T. Bartlett, 'Feminist Legal Methods', *Harvard Law Review*, (1990), 103, 829-88

M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, (New York, NY: Cambridge University Press, 2011)

M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (Kluwer Law International, 1999)

M. Cherif Bassiouni and William Schabas (eds), *The Legislative History of the International Criminal Court*, 2 vols. (Leiden, Brill: 2016)

J. Bauer and D. Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999)

Rachel Bayefsky, 'Dignity, Honour, and Human Rights: Kant's Perspective', *Political Theory*, (2013), 41(6), 809-37

Cesare Beccaria, *On Crimes and Punishment*, (translated, Edward Ingraham), (NY: Albany, W.C. Little and Co, 1872, originally published 1764)

Barbara Bedont and Katherine Hall Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court', *Brown Journal of World Affairs*, (1999), 6(1), 65-85

Sarah Ben-David and Ofra Schneider, 'Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance', *Sex Roles*, (2005), 53(5/6), 385-99

Linda Rae Bennett and Leonore Manderson (eds), *Violence Against Women in Asian Societies: Gender Inequality and Technologies of Violence*, (London: Routledge, 2018)

Morten Bergsmo, Alf Butenschøn Skre, Elisabeth J. Wood (eds), *Understanding and Proving International Sex Crimes*, (Beijing: Torkel Opsahl Academic EPublisher)

Dana Berliner, 'Rethinking the Reasonable Belief Defense to Rape', *Yale Law Journal*, (1991), 100(8), 2687-706

Catherine Besteman (ed.), *Violence: A Reader*, (New York, NY: New York University Press, 2002)

Monika Betzler (ed.), *Kant's Ethics of Virtue*, (Berlin: Deutsche Nationalbibliografie, 2008)

Deborah Blatt, 'Recognizing Rape as a Method of Torture', *Review of Law and Social Change*, (1992), 19(821), 821-65

David A. Blumenthal and Timothy L. H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence Or Institutionalised Vengeance?*, (Boston, MA and Leiden: Martinus Nijhoff Publishers, 2008), 205-28

Jelke Boesten, 'Of exceptions and continuities: theory and methodology in research on conflict-related sexual violence', *International Feminist Journal of Politics*, (2017), 19(4), 506-19

Jelke Boesten, 'Revisiting Methodologies and Approaches in Researching Sexual Violence in Conflict', *Social Politics: International Studies in Gender, State and Society*, (2018), 25(4), 457-68

A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law, Volume 7*, (Netherlands: Brill, 2003)

Kristen Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy and Consent', *Columbia Human Rights Law Review*, (2001), 32, 625-75

Ken Booth (ed.), *The Kosovo Tragedy: The Human Rights Dimensions*, (London and Portland, OR: Frank Cass Publishers, 2001)

A. Bosl, A. du Pisani and D. Zaire (eds), *Namibia's Foreign Relations. Historic contexts, current dimensions and perspectives for the 21st century*, (Windhoek: Konrad Adenauer Stiftung, 2014)

Tsjeard Bouta, Georg Frerks, and Ian Bannon, *Gender, Conflict, and Development*, (Washington, DC: World Bank Publications, 2005)

Baron Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, (Oxford: Oxford University Press, 2016)

Rudiger Braun and Huseyin L. Cicek (eds), *New Approaches to Human Dignity in the Context of Qu'ranic Anthropology: The Quest for Human Dignity*, (Cambridge: Cambridge Scholars, 2017)

Brian J. Brill (ed.), *Law of War Workshop Deskbook*, (New York, NY: Williams Hein &

Co, 2000)

Susan Brownmiller, *Against Our Will: Men, Women and Rape*, (London: Secker and Warburg, 1975)

Varda Burstyn, *The Rites of Men: Manhood, Politics, and the Culture of Sport*, (Toronto: University of Toronto, 1999)

David Buss and Neil Malamuth (eds), *Sex, Power, Conflict: Evolutionary and Feminist Perspectives*, (Oxford: Oxford University Press, 1996)

Doris E. Buss, 'Rethinking Rape as a Weapon of War', *Feminist Legal Studies*, (2009), 17(2), 145-63

Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, (Abingdon: Routledge, 2011)

C

Bruno Cabanes, *The Great War and the Origins of Humanitarianism, 1918-1924*, (New York, NY: Cambridge University Press, 2014)

Ann J. Cahill, 'Foucault, Rape and the Construction of the Feminine Body', *Hypatia*, (2000), 15(1), 43-63

Ann J. Cahill, *Rethinking Rape*, (Ithaca and London: Cornell University Press, 2001)

Karin N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents*, (Leiden: Martinus Nijhoff Publishers, 2006)

Kirsten Campbell, 'Producing Knowledge in the Field of Sexual Violence in Armed Conflict Research: Objects, Methods, Politics, and Gender Justice Methodology', *Social Politics: International Studies in Gender, State and Society*, (2018), 25(4), 469-95

Kirsten Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia', *International Journal of Transitional Justice*, (2007), 1(3), 411-32

Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research*, (Oxford: Oxford University Press, 2010)

John D. Caputo and Mark Yount (eds), *Foucault and the Critique of Institutions*, (Pennsylvania, PA: Pennsylvania State University Press, 1993)

Michael Carden, 'Homophobia and Rape in Sodom and Gibeah: A Response to Ken Stone', *Journal for the Study of the Old Testament*, (1999), 24(82), 83-96

Susan Caringella, *Addressing Rape Reform in Law and Practice*, (New York, NY: Columbia University Press, 2009)

R. Charli Carpenter, ‘Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations’, *Security Dialogue*, (2006), 37(1), 83-103

Richard Carver and Lisa Handley (eds), *Does Torture Prevention Work?*, (Oxford: Oxford University Press, 2017)

Stuart Casey-Maslen, (ed.), *The War Report: Armed Conflict in 2013*, (Oxford: University of Oxford, 2014)

Iris Chang, *The Rape Of Nanking: The Forgotten Holocaust Of World War II*, (London: Penguin Books, 1998)

Peter F. Chapman, ‘Ensuring Respect: United Nations Compliance with International Humanitarian Law’, *Human Rights Brief*, (2009), 17(1), 1-10

Louise Chappell, ‘Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court’, *Policy and Society*, (2003), 22(1), 3-25

Hilary Charlesworth, ‘Feminist Methods in International Law’, *American Journal of International Law*, (1999), 93(2), 379-94

Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’, *American Journal of International Law*, (1991), 85(4), 613-45

Lorie Charlesworth, ‘On historical contextualisation: Some critical socio-legal reflections’, *Crimes and Misdemeanours*, (2007), 1(1), 1-40

Hilary Charlesworth, ‘Feminist Critiques Of International Law and Their Critics’, *Third World Legal Studies*, (1995), 13(1), 1-16

Howard Chickering and Thomas Seller, *The Study of Chivalry: Resources and Approaches*, (Ann Arbor, MI: University of Michigan, 1988)

Christine Chinkin, ‘Rape and Sexual Abuse of Women in International Law’, *European Journal of International Law*, (1994), 5, 326-41

Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, (Oxford: Oxford University Press, 2014)

Lydia A. Cloughtery, *Feminist Legal Methods and the First Amendment Defense to Sexual Harassment, Nebraska Law Review*, (1996), 75(1), 2-26

Dara Kay Cohen, ‘Female Combatants and the Perpetration of Violence: Wartime Rape in the Sierra Leone Civil War’, *World Politics*, (2013), 65(3), 383-415

R. W. Connell, *Masculinities*, (Berkley and Los Angeles, CA: University of California Press, 1995)

Bernard A. Cook (eds), *Women and War: A Historical Encyclopaedia from Antiquity to the Present, Volume One*, (Santa Barbara, CA: ABC-CLIO, 2006)

Judith Cook, *Pirate Queen, the life of Grace O'Malley 1530–1603*, (Cork: Mercier Press, 2004)

Rebecca Cook (ed), *Human Rights of Women: National and International Perspectives*, (Philadelphia, PA: University of Pennsylvania Press, 1994)

Rhonda Copelon, 'Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law', *Hastings Women's Law Journal*, (1994), 5(2), 243-66

Brian Crawford, *Rwanda - Culture Smart!: The Essential Guide to Customs & Culture*, (London: Kuperard, 2019)

Kerry F. Crawford, *Wartime Sexual Violence: From Silence to Condemnation of a Weapon of War*, (Washington, DC: Georgetown University Press, 2017)

Kimberlé Crenshaw, *On Intersectionality: The Seminal Essays*, (New York, NY: New Press, 2012)

David Crouch, *The Birth of Nobility: Constructing Aristocracy in England and France, 900-1300*, (New York, NY: Pearson Education Limited, 2014)

Steven Currie, *Medieval Punishment and Torture*, (San Diego, CA: ReferencePoint Press, 2014)

D

Frank Dame, 'The Effect Of International Criminal Tribunals On Local Judicial Culture: The Superiority Of The Hybrid Tribunal', *Michigan State International Law Review*, (2015), 24(1), 213-77

Leonore Davidoff, *Worlds Between: Historical Perspectives on Gender and Class*, (Blackwell: Polity Press, 1995)

Michelle Davies, Jennifer Gilston, and Paul Rogers, 'Examining the Relationship Between Male Rape Myth Acceptance, Female Rape Myth Acceptance, Victim Blame, Homophobia, Gender Roles, and Ambivalent Sexism', *Journal of Interpersonal Violence*, (2012), 27(14), 2807-23

Sara E. Davies and Jacqui True (eds), *The Oxford Handbook of Women, Peace, and Security*, (Oxford: Oxford University Press, 2019)

Maria Martin de Almagro, 'Transitional Justice and Women, Peace and Security: A Critical Reading of the EU Framework', *LSE Women, Peace and Security Working Paper Series*, (2017), 5, 1-14

Simone de Beauvoir, *The Second Sex*, (translated, Constance Board and Sheila Malovany

Chevallier), (London: Vintage Books, 1949)

Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, (Antwerpen and Oxford: Intersentia, 2005)

Anne-Marie de Brouwer, 'The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes', *Cornell International Law Journal*, (2015), 48, 639-66

Cedric De Coning and Mateja Peter (eds), *United Nations Peace Operations in a Changing Global Order*, (Cham: Palgrave MacMillan, 2019)

Teresa De Lauretis, *Technologies of Gender: Essays on Theory, Film, and Fiction*, (Bloomindale, IN: Indiana University Press, 1987)

Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on* Luxury, (edited and with an Introduction by Béla Kapossy and Richard Whatmore), (Indianapolis, IN: Liberty Fund, 2008)

Elizabeth F. Defeis, 'U.N. Peacekeepers and Sexual Abuse and Exploitation', *Washington University Global Studies Law Review*, (2008), 7(2), 185-214

Sarah Deibler, 'Rape by Any Other Name: Mapping the Feminist Legal Discourse Regarding Rape in Conflict Onto Transitional Justice in Cambodia', *American University International Law Review*, (2017), 32(2), 501-37

Irene Diamond and Lee Quinby (eds), *Feminism and Foucault: Reflections on Resistance*, (Boston, MA: Northeastern University Press, 1988)

Sarah Diebler, 'Rape by Any Other Name: Mapping the Feminist Legal Discourse Regarding Rape in Conflict Onto Transitional Justice in Cambodia', *American University International Law Review*, (2017), 32(2), 501-37

Mike Donaldson, 'What Is Hegemonic Masculinity?', *Theory and Society, Special Issue: Masculinities*, (1993), 22(5), 643-57

Gregory P. Downs and Kate Masur (eds), *The World the Civil War Made*, (Chapel Hill, NC: University of North Carolina Press, 2015)

Page duBois, *Torture and Truth*, (Oxon: Routledge, 1991)

Edelgard E. DuBruck and Yael Even (eds), *Fifteen-century Studies, Volume 27: A Special issue on Violence in Fifteenth-century Text and Image*, (Rochester, NY and Suffolk: Camden House and Boydell and Brewer, 2002)

Helen Durham, Timothy L. H. MacCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, (Hague: Martinus Nijhoff Publilshers,

1999)

E

Chile Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, (Leiden and Boston, MA: Martinus Nijhoff Publishers, 2012)

Alice Edwards, *Violence Against Women under International Human Rights Law*, (Cambridge: Cambridge University Press: 2011)

Christine Eifler and Ruth Seifert (eds), *Gender Dynamics and Post-conflict Reconstruction*, (Frankfurt: Peter Lang, 2009)

Terje Einarsen and Joseph Rikhof, *A Theory of Punishable Participation in Universal Crimes*, (Brussels: Torkel Opsahl Academic EPublisher, 2018)

Amani El Jack, *Gender and Armed Conflict: Overview Report*, (Brighton: BRIDGE, 2003)

George Eliot (Mary Ann Evans), *The Mill on the Floss*, (Leipzig: Bernard Tauchnitz, 1860)

Karen Engle, 'Feminism and Its (DIS)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', *American Journal of International Law*, (2005), 99(4), 778-816

Sally Engle Merry, 'Measuring the World: Indicators, Human Rights and Global Governance', *Current Anthropology*, (2011), 52(3), 239-43

Par Engstrom (ed.), *The Inter-American Human Rights System: Impact Beyond Compliance*, (Cham: Palgrave MacMillan, 2019)

Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?*, (Ebook: Örebro University Studies in Law, 2010)

Daniel Evans, *International Affairs and Intelligence Studies Primer*, (Savannah, GA and Raleigh, NC: Evans Analytics, 2011)

F

Nancy Farwell, 'War Rape: New Conceptualizations and Responses', *Affilia*, (2004), 19(4), 389-403

Dermot Feenan (ed.), *Exploring the 'Socio' of Socio-Legal Studies*, (Hampshire: Palgrave Macmillan, 2013)

Elise Feron, *Wartime Sexual Violence Against Men: Masculinities and Power in Conflict Zones*, (London: Rowan and Littlefield, 2018)

Griffin Ferry, 'Oppression Through "Protection": A Survey of Femininity in Foundational Humanitarian Law Texts', *Law & Inequality: A Journal of Theory and Practice*, (2017), 35(1), 57-74

Eva Figes, *Patriarchal Attitudes: Women in Society*, (Houndmills, Basingstoke and Hampshire: MacMillan Education Ltd., 1986)

Robert Filmer, *Patriarcha*: *Or The Natural Power of Kings*, (London: Richard Chiswell, 1680)

Martha Fineman and Roxanne Mikitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse*, (New York: Routledge, 1994)

Lucinda M. Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning', *Notre Dame Law Review*, (1989), 64(886), 886-910

James Fitzjames Stephen, *Liberty, Fraternity, Equality*, 3 vols, (London: MacMillan, 1883)

Mark S. Fleisher and Jessie L. Krienert, *The Myth of Prison Rape: Sexual Culture in American Prisons*, (Lanham, MD: Rowman and Littlefield, 2009)

Susan Forbes Martin, John Tirman (eds), *Women, Migration, and Conflict: Breaking a Deadly Cycle*, (Dordrecht: Springer, 2009)

Katharine Fortin, 'Rape as torture: An evaluation of the Committee against Torture's attitude to sexual violence', *Utrecht Law Review*, (2008), 4(3), 145-62

Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (New York, NY: Knopf Doubleday Publishing Group, 2012)

Michel Foucault, *The history of sexuality: Vol.1, An introduction*, (New York, NY: Random House, Inc., 1990)

Michel Foucault, 'Technologies of the Self', Lectures at University of Vermont, October 1982, *Technologies of the Self*, (Massachusetts, MA: University of Massachusetts Press, 1988), 16-49

Estelle B. Freedman, *Redefining Rape*, (London and Cambridge, MA: Harvard University Press, 2013)

Rosa Freedman, 'UNaccountable: A New Approach to Peacekeepers and Sexual Abuse', *European Journal of International Law*, (2018), 29(3), 961-85

Estelle B. Freeman, *Redefining Rape*, (Cambridge, MA: Harvard University Press, 2013)

Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, (Oxford: Oxford University Press, 2012)

Betty Friedan, *The Feminine Mystique*, (New York, NY: Penguin Books, 2010)

Patrick Frierson and Paul Guyer (eds), *Kant: Observations on the Feeling of the Beautiful and Sublime and Other Writings*, (New York, NY: Cambridge University Press, 2011)

Christy Fujio, 'From Soft to Hard Law: Moving Resolution 1325 on Women, Peace and Security Across the Spectrum', *Georgetown Journal of Gender and the Law*, (2008), 9(1), 215-35

G

Gloria Gaggioli, 'Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law', *International Review of the Red Cross*, (2014), 96(894), 503-38

Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law*, (London and The Hague: Kluwer Law International, 2001)

Roberta Garner (ed.), *Social Theory: A Reader Volume I: The Formative Years*, (Toronto: University of Toronto, 2010)

Rosemary Gartner and Bill McCarthy (eds), *The Oxford Handbook of Gender, Sex, and Crime*, (Oxford: Oxford University Press, 2014)

Miriam Gebhardt, Crimes Unspoken: *The Rape of German Women at the End of the Second World War*, (translated, Nick Somers), (Cambridge and Malden, MA: Polity Press, 2017)

Catherine Gegout, The International Criminal Court: limits, potential and conditions for the promotion of justice and peace, *Third World Quarterly*, (2013), 34(5), 800-18

Sophia Genovese, 'Prosecuting U.N. Peacekeepers for Sexual and Gender-Based Violence in the Central African Republic', *Brooklyn Journal of International Law*, (2018), 43(2), 609-37

Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights*, (New York, NY: Cambridge University Press, 2014)

Rebecca Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia*, (Cham: Palgrave Macmillan, 2019)

Stephanie Gilmore (ed.), *Feminist Coalitions. Historical Perspectives on Second Wave Feminism in the United States*, (Champaign, IL: University of Illinois Press, 2008)

Chiara Giorgetti (ed.), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*, (Leiden: Martinus Nijhoff Publishers, 2012)

Leonard L. Glass, 'Man's Man/Ladies' Man: Motifs of Hypermasculinity', *Psychiatry: Interpersonal and Biological Processes*, (1984), 47(3), 260-78

Michael D. Goldhaber, *A People's History of the European Court of Human Rights*,

(New Brunwick, NJ and London: Rutgers University Press)

Joshua S. Goldstein, *War and Gender: How Gender Shapes the War System and Vice Versa*, (Cambridge: Cambridge University Press, 2003)

Richard J. Goldstone, 'Prosecuting Rape as a War Crime,' *Case Western Reserve Journal of International Law*, (2002), 34(3), 277-86

Robert W. Gordon, 'Foreword: The Arrival of Critical Historicism', *Stanford Law Review*, (1997), 49, 1023-29

Kate Grady, 'Disciplinary Offences at the Court Martial', *Criminal Law Review*, (2016), (10), 714-42

Antonio Gramsci, *Prison Notebooks: Volume I*, (edited and translated, Joseph A. Buttigieg), (New York, NY: Columbia University Press, 1992)

Antonio Gramsci, *Prison Notebooks: Volume II*, (edited and translated, Joseph A. Buttigieg), (New York, NY: Columbia University Press, 2011)

Keith Green and Jill LeBihan, *Critical Theory and Practice: A Coursebook*, (London: Routledge, 2001)

Trisha Greenhalgh and Jill Russell, 'Evidence-Based Policymaking: A Critique', *Perspectives in Biology and Medicine*, (2009), 52(2), 304-18

Germaine Greer, *The Female Eunuch*, (New York, NY: McGraw-Hill, 1971)

Germaine Greer, *On Rape*, (London and Melbourne: Bloomsbury Publishing, 2018)

Jean Grimshaw, *Philosophy and Feminist Thinking*, (Minneapolis, MN: University of Minnesota Press, 1986)

Will Grimshaw, *An Etymological Dictionary of the English Language, containing the radicals ad definitions of words derived from the Greek, Latin, and French languages and all the generally used technical and polite phrases adopted from French and Latin*, (Pennsylvania, PA: Grigg, Elliot & Co, 1848)

Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', *Chicago Journal of International Law*, (2012), 12(2), 647-84

Nienke Grossman, 'Achieving Sex-Representative International Court Benches', *American Journal of International Law*, (2016), 110(1), 82-95

Nienke Grossman, 'Shattering the Glass Ceiling in International Adjudication', *Virginia Journal of International Law*, (2016), 56(2), 1-80

Sonja Grover, *Humanity's Children. ICC Jurisprudence and the Failure to Address the Genocidal Forcible Transfer of Children*, (Berlin: Springer, 2012)

F. B. Gumru and J. M. Fritz, 'Women, Peace and Security: An Analysis of the National Action Plans Developed in Response to UN Security Council Resolution 1325', *Societies Without Borders*, (2009), 4(2), 209-25

Sneja Gunew (ed.), *Feminist Knowledge: Critique and Construct*, (London and New York: Routledge)

H

Heidi Haddad, 'Mobilizing the Will to Prosecute: Crimes of Rape and the Yugoslav and Rwandan Tribunals', *Human Rights Review*, (2011), 12(1), 109-32

Rebecca L. Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory', *Harvard Journal of Law and Gender*, (2006), 29, 201-21

Alona Hagay-Frey, 'Sex and Gender Crimes in International Law', in Klaus Hoffmann-Holland (ed.), *Ethics and Human Rights in a Globalized World: An Interdisciplinary and International Approach*, (Mohr Siebeck: Tübingen, 2009), 179-208

Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present*, Future, (Lieden: Martinus Nijhoff Publishers, 2011)

David Haig, 'The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945-2001', *Archives of Sexual Behavior*, (2004), 33(2), 87–96

Lisa Hajjar, *Torture: A Sociology of Violence and Human Rights*, (Abingdon: Routledge, 2013)

Catherine Hall, *White, Male and Middle Class: Explorations in Feminism and History*, (Blackwell: Polity Press, 2007)

June Hannam, *Feminism*, (Oxon: Routledge, 2014)

Gina Heathcote, *Feminist Dialogues on International Law: Successes, Tensions, Futures*, (Oxford: Oxford University Press, 2019)

Gina Heathcote, 'Feminist Politics And The Use Of Force: Theorising Feminist Action And Security Council Resolution 1325', *Socio-legal Review*, (2011), (7), 23-43

Gina Heathcote, 'Naming and Shaming: Human Rights Accountability in Security Council Resolution 1960 (2010) on Women, Peace and Security', *Journal of Human Rights Practice*, (2012), 4(1), 82-105

Gina Heathcote, 'Security Council Resolution 2242 on women, peace and security: progressive gains or dangerous development?', *Global Society*, (2018), 32(4), 374-94

Gina Heathcote and Dianne Otto (eds), *Rethinking Peacekeeping, Gender Equality and Collective Security*, (Basingstoke: Palgrave MacMillian, 2014)

Eric Heinze, 'Even-handedness and the Politics of Human Rights', *Harvard Human Rights Journal,* (2008), 21, 7-46

Susan Hekman (ed.), *Feminist Interpretations of Michel Foucault*, (Pennsylvania: Pennsylvania University Press, 1996)

Deborah Hellman, Sophia Moreau and Sophia Reibetanz Moreau (eds), *Philosophical Foundations of Discrimination Law*, (Oxford: Oxford University Press, 2013)

Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law*, (Cambridge and New York, NY: Cambridge University Press, 2013)

Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era*, (Abingdon: Routledge)

Holly Henderson, 'Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention', *Berkeley Journal of Gender, Law and Justice*, (2007), 22(1), 225-53

Nicola Henry, *War and Rape: Law, Memory and Justice*, (Abingdon: Routledge, 2011)

Nicola Henry, 'Theorizing Wartime Rape: Deconstructing Gender, Sexuality, and Violence', *Gender & Society*, (2016), 30(1), 44-56

Marsha Henry and Paul Higate, *Insecure Spaces: Peacekeeping, Power and Performance in Haiti, Kosovo and Liberia*, (London: Zed Books, 2013)

Jennifer Higginbotham, *Girlhood of Shakespeare's Sisters*, (Edinburgh: Edinburgh University Press, 2013)

Nicole Hogg 'Women's participation in the Rwandan genocide: mothers or monsters?', *International Review of the Red Cross*, (2010), 92(877), 69-102

Homer, *The Iliad*, (translated, Rodney Merrill), (Michigan, MI: University of Michigan, 2010)

bell hooks, *Talking Back: Thinking Feminist, Thinking Black*, (Boston, MA: South End Press, 1989)

Richard Howson and Kylie Smith (eds), *Hegemony: Studies in Consensus and Coercion*, (Abingdon: Routledge, 2008)

Terry C. M. Hutchinson, *Research and Writing in Law*, (Sydney: Lawbook Co., 2002)

Patricia Hynes, Michele Lamb, Damien Short and Matthew Waites (eds), *Sociology and Human Rights: New Engagements*, (Abingdon: Routledge, Group, 2011)

I
Tuba Inal, *Looting and Rape in Wartime: Law and Change in International Relations*, (Philadelphia, PA: University of Pennsylvania, 2013)

Ian Inkster, Colin Griffin, Jeff Hill and Judith Rowbotham (eds), *The Golden Age. Essays in British Social and Economic History 1850-1870*, (London: Routledge, 2017)

International Institute for Strategic Studies, *The IISS Armed Conflict Survey 2017*, (London: Routledge/International Institute for Strategic Studies, 2017)

J
Susie Jacobs, Ruth Jacobson, and Jennifer Marchbank (eds), *States of Conflict: Gender, Violence and Resistance*, (London and New York, NY: Zed Books, 2000)

Vicki C. Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse', *Montana Law Review*, (2004), 65(15), 15-40

Susan James, Stephanie Palmer (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy*, (Oregon: Hart Publishing, 2002)

Karol Janicki, *Language Misconceived: Arguing for Applied Cognitive Linguistics* (Abingdon: Routledge, 2014)

Rachel Jewkes, Robert Morrell, Jeff Hearn, Emma Lundqvist, David Blackbeard, Graham Lindegger, Michael Quayle, Yandisa Sikweyiya and Lucas Gottzé, 'Hegemonic masculinity: combining theory and practice in gender interventions', *Cult Health*, (2015), 17(2), 112-27

Adam Jones, 'Straight as a Rule: Heteronormativity, Gendercide, and the Noncombatant Male', *Men and Masculinities*, (2006), 8(4), 451-69

Jackie Jones, Anna Grear, Anne Fenton and Kim Stevenson (eds), *Gender Sexualities and Law*, (Abingdon: Routledge, 2011)

K
Adrienne Kalosich, 'Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foča', *Women's Rights Law Reporter*, (2003), 4(2), 121-36

Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective*, (Cambridge: Islamic Texts Society, 2002)

Machiko Kanetake, 'The UN Zero Tolerance Policy's Whereabouts: On the Discordance between Politics and Law on the Internal-External Divide', *Amsterdam Law Forum*, (2012), 4(4), 51-61

Jacqueline Kanovic, *Constitutional Law*, (London: Routledge, 2014)

Immanuel Kant, *Critique of Practical Reason*, (translated, Mary Gregor, Introduction by

Andrews Reath, Revised Edition), (Cambridge: Cambridge University Press, 2015)

Immanuel Kant, *Metaphysical Elements of Justice: Second Edition, The complete text of Metaphysics of Morals, Part 1*, (translated with Introduction and Notes, John Ladd), (Indianapolis, IN: Hackett Publishing Company Inc, 1999)

Immanuel Kant, *Observations on the Feeling of the Beautiful and Sublime*, (translated, John T. Goldthwait), (Berkley and Los Angeles, CA, and London: University of California Press, 2003)

Immanuel Kant, *On the Old Saw: That May be Right in Theory But It Won't Work in Practice,* (translated, E. B. Ashton, Introduction by George Miller), (Pennsylvania, PA: University of Pennsylvania, 1974)

Amrita Kapur and Kelli Muddell, *When No One Calls it Rape: Addressing Sexual Violence Against Men and Boys*, (New York, NY: International Center for Transitional Justice, 2016)

Paulus Kaufmann, Hannes Kuch, Christian Neuhaeuser, and Elaine Webster (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, (New York, NY: Springer, 2011)

Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society*, (Cambridge: Cambridge University Press, 2003)

Linda M. Keller, 'The Impact of States Parties' Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', *Michigan State Law Review*, (2014), 309-26

Florynce Kennedy, *Color Me Flo: May Hard Life and Good Times*, (New Jersey, NJ: Prentice-Hall, 1976)

Rachel Kerr and Jessica Lincoln, 'The Special Court for Sierra Leone Outreach, Legacy and Impact Final Report', War Crimes Research Group Department of War Studies, (2008)

Yougindra Khushalani, *The Dignity and Honour of Women as Basic and Fundamental Human Rights*, (London, Hingham, MA and The Hague: Martinus Nijhoff Publishers, 1982)

Michael Kimmel and Amy Aronson (eds), *Men and Masculinities: A Social, Cultural, and Historical Encyclopaedia: Volume I: A-J*, (Santa Barbra, CA, Denver, CO and Oxford: ABC:CLIO, 2004)

Paul Kirby, 'Refusing to be a Man?: Men's Responsibility for War Rape and the Problem of Social Structures in Feminist and Gender Theory', *Men and Masculinities,* (2013), 16(1), 93-114

Jackie Kirk and Suzanne Taylor, 'UNSCR 1325', *Forced Migration Review*, (2007), 27,

13-4

Renate Klein (ed.), *Framing Sexual and Domestic Violence Through Language*, (Basingstoke: Palgrave Macmillan, 2013)

Pauline Kleingeld, 'The Problematic Status of Gender-Neutral Language in the History of Philosophy: The Case of Kant', *The Philosophical Forum*, (1993), 25(2), 134-50

Sherryl Kleinman, *Opposing Ambitions: Gender and Identity in an Alternative Organization*, (Chicago, IL and London: University of Chicago Press, 1996)

Robert Kolb, *The International Court of Justice*, (Oxford and Portland, OR: 2013)

Norbert Konrad, Birgit Völlm, and David N. Weisstub (eds), *Ethical Issues in Prison Psychiatry*, (Heidelberg, London, Dordrect and New York, NY: Springer, 2013)

Joachim A. Koops, Norrie MacQueen, Thierry Tardy and Paul D. Williams (eds), *The Oxford Handbook of United Nations Peacekeeping Operations*, (Oxford: Oxford University Press, 2015)

Maja Korac, 'Feminists Against Sexual Violence in War: the Question of Perpetrators and Victims Revisited', *Social Sciences*, 7, (2018), 182-95

Paula Krebs, *Gender, Race and the Writing of Empire. Public Discourse and the Boer War*, (Cambridge: Cambridge University Press, 1999)

L. D. Kritzman (ed.), *Politics, philosophy, culture: Interviews and other writings, 1977-1984*, (translated, Alan Sheridan *et al.*), (New York, NY: Routledge, 1988)

Annica Kronsell and Erika Svedberg (eds), *Making Gender, Making War: Violence, Military and Peacekeeping Strategies*, (Abingdon: Routledge, 2011)

Manfred Kuehn, *Kant: A Biography*, (New York, NY, Melbourne, and Cambridge: Cambridge University Press, 2001)

Sari Kuovo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law*, (Oxford: Hart Publishing, 2011)

L

Eve La Haye, *War Crimes in Internal Armed Conflicts*, (Cambridge and New York, NY: Cambridge University Press, 2008)

James Lang (ed.), *Partners in Change: Working with Men To End Gender-Based Violence*, (Santo Domingo: UN International Research and Training Institute for the Advancement of Women, 2002)

John Langbein, *Torture and the Law of Proof*, (Chicago, IL and London: University of Chicago Press, 2012)

Janie L. Leatherman, *Sexual Violence and Armed Conflict*, (Cambridge and Malden, MA: Polity Press, 2011)

J. E. Lendon, *Empire of Honour: The Art of Government in the Roman World*, (Oxford: Oxford University Press, 1997)

Diana Leonard and Lisa Adkins (eds), *Sex in Question: French Materialist Feminism*, (London and Bristol, PA: Taylor & Francis, 2005)

Gerda Lerner, *The Creation of Feminist Consciousness from the Middle Ages to 1870*, (Oxford: Oxford University Press, 1993)

Gerda Lerner, *The Creation of Patriarchy*, (New York, NY: Oxford University Press, 1986)

Mark Lewis, *The Birth of the New Justice. The Internationalisation of Crime and Punishment, 1919-1950*, (Oxford: Oxford University Press, 2014)

Matthew Lippman, 'The Development and Drafting of the UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment', *Boston College International and Competitive Law Review*, (1994), 17(2), 275-335

Lois Ann Lorentzen and Jennifer Turpin (eds), *The Women and War Reader*, (New York, NY: New York University Press, 1998)

Daniël Johannes Louw, *Wholeness in Hope Care: On Nurturing the Beauty of the Human Soul in Spiritual Healing*, (Zurich: Deutsche Nationalbibliothek, 2015)

M

Olivia Q. MacDonald and Gabrielle Kirk Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience International and National Courts: Volume II, Part 1 Documents and Cases*, (The Hague: Kluwer Law International, 2000)

Catharine A. MacKinnon, *Are Women Human?: And Other International Dialogues*, (Cambridge, MA and London: Belknap Press of Harvard University Press, 2006)

Catharine A. MacKinnon, 'Defining Rape Internationally', *Columbia Journal of Transnational Law*, (2006), 44(3), 940-58

Catharine A. MacKinnon, 'Oncale v. Sundowner Offshore Services, Inc., 96-568, Amici Curiae Brief in Support of Petitioner', *UCLA Women's Law Journal*, (1997), 8(1), 9-46

Catherine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, (New Haven, CT: Yale University Press, 1979)

Catharine A. MacKinnon, 'The ICTR's Legacy on Sexual Violence', *New England Journal of International and Comparative Law*, (2008), 14(2), 211-20

Catharine A. MacKinnon, 'The Recognition of Rape as an Act of Genocide – Prosecutor v. Akayesu', Guest Lecture Series of the Office of the Prosecutor, The Hague, 27 October 2008, *New England Journal of International and Comparative Law*, (2008), 14(2), 101-10

Catharine A. MacKinnon, *Towards a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989)

Ruth Macklin, 'Dignity is a useless concept: It means no more than respect for persons or their autonomy', *BMJ*, (2003), 327(7429), 1419-20

K. E. Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge*, (Dordrecht: Martinus Nijhoff Publishers, 1993)

Peter Malanczuk, *Akehurst's Modern Introduction of International Law: Seventh Revised Edition*, (New York, NY: Routledge, 1997)

Siniša Malešević, *Sociology of War and Violence*, (New York, NY: Cambridge University Press, 2010)

David M. Malone, *The UN Security Council: From the Cold War to the 21st Century*, (Colorado, CO: Lynne Rienner Publishers, 2004)

Judy Maloof, *Voices of Resistance: Testimonies of Cuban and Chilean Women*, (Lexington, KY: University Press of Kentucky)

Anjali Manivannan, 'Seeking Justice for Male Victims of Sexual Violence in Armed Conflict', *International Law and Politics*, (2014), 46(635), 635-79

Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis*, (Copenhagen: Springer, 2014)

Triestino Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity*, (London: Routledge, 2015)

Marta Martinelli, *UNSC Resolution 1325 fifteen years on*, (Brussels: European Union Institution for Security Studies, 2015)

Susan Marks and Andrew Clapham, *International Human Rights Lexicon*, (Oxford: Oxford University Press, 2005)

Mariëlle Matthee, Brigit Toebes, and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face*, (The Hague: Asser Press, 2013)

Heikki Mattila, *Comparative Legal Linguistics*, (Aldershot: Ashgate, 2007)

Dyan Mazurana, Angela Raven-Roberts, and Jane Parpart, *Gender, Conflict, and Peacekeeping*, (Lanham, MD and Oxford: Rownan & Littlefield, 2005)

Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’, *European Journal of International Law*, (2008), 19(4), 655-724

Clare McGlynn, ‘Rape, torture and the European Convention on Human Rights’, *International and Comparative Law Quarterly*, (2009), 58(3), 565-95

Clare McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives*, (Oxford and New York, NY: Routledge, 2010)

Joan McGregor, *Is It Rape: on acquaintance rape and taking women’s consent seriously*, (Abingdon: Routledge, 2017)

Frederic Megret, ‘The Laws of War and the Structure of Masculine Power’, *Melbourne Journal of International Law*, (2018), 19(1), 200-26

Simon M. Meisenberg and Ignaz Stegmiller (eds), *The Extraordinary Chambers of the Courts of Cambodia: Assessing their Contribution to International Criminal Law*, (The Hague: Asser Press, 2016)

Mari Mikkola, ‘Kant On Moral Agency and Women’s Nature’, *Kantian Review*, (2011), 16(1), 89-111

Steven Miles, *Oath Betrayed: Torture, Medical Complicity and the War on Terror*, (New York, NY: Random House, 2006)

John Stuart Mill, *On The Subjection of Women*, (London: Longman, Green Read and Dyer, 1869)

Stephen M. Miller, ‘Duty or Crime? Defining Acceptable Behavior in the British Army in South Africa’, *Journal of British Studies*, (2010), 49(2), 311-31

Kate Millet, *Sexual Politics*, (Urbana, IL: University of Illinois Press, 2000)

Albert J. Mills, Gabrielle Durepos and Elden Wiebe (eds), *Encyclopedia of Case Study Research*, (Los Angeles, LA: SAGE Publications, 2010)

Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, (Oxford: Oxford University Press, 2014)

J. Money, ‘Hermaphroditism, gender and precocity in hyperadrenocorticism: Psychologic findings’, *Bulletin of the Johns Hopkins Hospital*, (1955), 96, 253–64

Jeffrey Morton, *The International Law Commission of the United Nations*, (South Carolina, SC: University of South Carolina Press, 2000)

Donald L. Mosher, and Silvan S. Tomkins, ‘Scripting the Macho Man: Hypermasculine Socialization and Enculturation’, *The Journal of Sex Research*, (1988), 25(1), 60-84

Caroline. O. N. Moser and Fiona C. Clark (eds), *Victims, Perpetrators or Actors?*

Gender, Armed Conflict and Political Violence, (London and New York, NY: Zed Books, 2001)

Kurt Mosser, 'Kant and Feminism', *Philosophy Faculty Publications*, (1999), 21, 322-53

Norah Hashim Msuya, 'Concept of Culture Relativism and Women's Rights in Sub-Saharan Africa', *Journal of Asian and African Studies*, (2019), 54(8), 1145-58

Madhumanti Mukherjee, **'**Judging in the Presence of Women as Legal Persons – Feminist Alternative to the Indian Supreme Court Judgment in Sakshi v. Union of India', *Feminist@law*, (2011), 1(2), 1-71

Vanessa E. Munro and Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements*, (Abingdon: Routledge-Cavendish, 2014)

Sarah K. Murnen and Donn Byrne, 'Hyperfemininity: Measurement and Initial Validation of the Construct', *The Journal of Sex Research*, (1991), 28(3), 479-89

Ray Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice*, (Cambridge: Cambridge University Press, 2007)

Julius Mutwol, *Peace Agreements and Civil Wars in Africa: Insurgent Motivations, State Responses and Third-Party Peacemaking in Liberia, Rwanda, and Sierra Leone*, (Amherst, NY: Cambria Press, 2009)

Henri Myrttinen, 'Re-thinking hegemonic masculinities in conflict-affected contexts', *Critical Military Studies*, (2017), 3(2), 103-19

N

Ngaire Naffine and Rosemary J. Owens, *Sexing the Subject of Law*, (London: Sweet and Maxwell, 1997)

Muna Ndulo, 'The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions', *Berkley Journal of International Law*, (2009), 27(1), 127-61

Megan Kate Nelson, *Ruin Nation: Destruction and the American Civil War*, (Athens and London: University of Georgia Press, 2012)

Fionnuala Ní Aoláin, 'Women, Security, and the Patriarchy of Internationalized Transitional Justice', *Human Rights Quarterly*, (2009), 31(4), 1055-85

Fionnuala Ní Aoláin, Naomi Cahn, Dina Francesca Haynes, and Nahla Valji (eds), *The Oxford Handbook of Gender and Conflict*, (Oxford: Oxford University Press, 2018)

Catherine N. Niarchos, 'Women, War, and Rape: Challenges Facing the International Criminal Tribunal for the Former Yugoslavia', *Human Rights Quarterly*, (1995), 17(4), 649-90

Pamela Nicholson, *The Second Wave: A Reader in Feminist Theory*, (New York, NY: Routledge, 1997)

Carolyn Nordstrom, 'Rape: Politics and Theory in War and Peace', *Australian Feminist Studies*, (1996), 11(23), 147-62

Anne Norton, *On The Muslim Question* (Princeton, NJ: Princeton University Press, 2013)

Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach*, (Cambridge: Cambridge University Press, 2000)

O

Ugumanim Bassey Obo and Dickson Ekpe, 'Africa and the international criminal court: A case of imperialism by another name', *International Journal of Development and Sustainability*, (2014), 3(10), 2025-36

Dennis O'Brien, *Understanding Male Sexual Abuse: Why Male Victims Remain Silent*, (Bloomington, IN: iUniverse, 2011)

Karen Offen, *European Feminisms 1780-1950: A* Political History, (Stanford, CA: Stanford University Press, 2000)

Adebola O. Olaborede and Nasila S. Rembe, 'Reflections on the Debate Between Universality of Human Rights and Cultural Relativism in the Context of Child Marriage in Africa', *Speculum Juris*, (2018), 32(2), 94-105

Funmi Olonisakin, Karen Barnes, Eka Ikpe (eds), *Women, Peace and Security: Translating Policy Into Practice*, (Abingdon: Routledge, 2011)

Conor O'Mahony, 'There is no such thing as a right to dignity', *I•CON*, (2012), 10(2), 551–74

Valerie Oosterveld, 'The Influence of Domestic Legal Traditions on the Gender Jurisprudence of International Criminal Tribunals', *Cambridge Journal of International and Comparative Law*, (2013), 2(4), 825-49

Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law', *Michigan Journal of International Law*, (2004), 25, 605-51

Valerie Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals', *Journal of International Law and International Relations*, (2014), (10), 107-28

Valerie Oosterveld, 'The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments', *Cornell International Law Journal*, (2011), 44, 49-74

A. Orford (ed.), *International Law and Its Others*, (Cambridge: Cambridge University

Press, 2006)

Dianne Otto, ‘Beyond legal justice: some personal reflections on people’s tribunals, listening and responsibility’, *London Review of International Law*, (2017), 5(2), 225-49

P

Jennifer Park, ‘Sexual Violence as a Weapon of War in International Humanitarian Law’, *International Public Policy Review*, (2007), 3(1), 13-8

John T. Parry, *Understanding Torture: Law, Violence, and Political Identity*, (Michigan, MI: University of Michigan Press, 2010)

Hannah Pearce, ‘An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture’, *International Journal of Refugee Law*, (2002), 14(4), 534-60

Michael Peel (ed.), *Rape as a Method of Torture*, (London: Medical Foundation for the care of victims of torture, 2001)

Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone under Scrutiny*, (The Hague: International Center for Transitional Justice, 2006)

Roger Peters, *Women’s Rights, Human Rights: International Feminist Perspectives*, (London and New York, NY: Routledge, 1995)

Sara Elise Phang, *The Marriage of Roman Soldiers (13 B.C.-A.D. 235): Law and Family in the Imperial Army*, (Leiden, Boston, MA and Köln: Brill, 2001)

Jennifer Pitt, *Boundaries of the International: Law and Empire* (Cambridge, MA: Harvard University Press, 2018)

Plato, *Republic*, (translated, John Llewelyn Davies and David James Vaughan), (Ware: Wordsworth Editions, 1996)

Dan Plesch, *Human Rights After Hitler: the Lost History of Prosecuting Axis War Crimes*, (Washington, DC: Georgetown University Press, 2017)

A. J. Pollard, *John Talbot and the War in France 1427-1453*, (Yorkshire: Pen and Sword Military, 2005)

Thean Potgieter and Ian Liebenberg (eds), *Reflections on War: Preparedness and Consequences*, (Stellenbosch: Sun Media, 2012)

Monique Plaza, ‘Our Damages and Their Compensation. Rape: The Will Not to Know of Michel Foucault’, *Feminist Issues*, (1981), 1(2), 25-35

Nicola Pratt and Sophie Richter-Devroe, ‘Critically Examining UNSCR 1325 on Women, Peace and Security’, *International Feminist Journal of Politics*, (2011), 13(4), 489-503

Nicola Pratt and Sophie Richter-Devroe (eds), *Gender, Governance and International Security*, (London and New York: Routledge: Taylor & Francis Group, 2014)

Gerard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*, (Oxford: Oxford University Press)

Gerard Prunier, *The Rwanda Crisis, 1959-1994: History of a Genocide*, (London: C. Hurst & Co. Publishers, 1995)

Q

Noelle Quénivet, *Sexual Offences in Armed Conflict and International Law*, (Ardsley, NY: Transnational Publishers, Inc., 2005)

Stanley Quick with Chipp Reid, *Lion in the Bay: The British Invasion of the Chesapeake, 1813-14*, (Annapolis, MD: Naval Institute Press, 2015)

R

Kurt A Raaflaub (ed.), *War and Peace in the Ancient World*, (Oxford: Blackwell, 2007)

Caroline Ramazanoglu with Janet Holland, *Feminist Methodology. Challenges and Choices*, (London: Sage, 2002)

Frederick Rawski, 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations', *Connecticut Journal of International Law*, (2002-2003), 18(103), 103-32

Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building*, (New York, NY: UN Development Fund for Women, 2002)

Jane Rendall, *The Origins of Modern Feminism: Women in Britain, France and the United States 1780-1860*, (London: Macmillan, 1985)

Deborah L. Rhode, 'Feminist Critical Theories', *Stanford Law Review*, (1990), 42(3), 617-38

Adrienne Rich, *On Lies, Secrets, and Silence: Selected Prose 1966-1978*, (New York, NY: WW Norton and Company, 1979)

Jeffrey Richards *Swordsmen of the Screen: From Douglas Fairbanks to Michael York*, (Oxon and New York, NY: Routledge, 2014)

Karen A. Ritzenhoff and Jakub Kazecki (eds), *Heroism and Gender in War Films*, (Basingstoke: Palgrave Macmillan, 2014)

Judith Rowbotham, '"Knowing Too Much": The Problems of Female Testimony in Rape Cases and the Challenge of Respectability', unpublished conference paper, Gender Unbound: Conference on Law, Gender and Sexuality, Keele University, 9-11 July 2007

Judith Rowbotham, Lorie Charlesworth and Michael Kandiah, 'Justice? – Whose Justice? Punishment, Mediation or Reconciliation?', *Law, Crime and History*, (2011), 2, 194-214

Judith Rowbotham and Fiona Tate, 'The Global Summit: End Sexual Violence in Conflict Now', *Law, Crime and History*, (2014), 4(2), 91-8

Kaushik Roy, *Hinduism and the Ethics of Warfare in South Asia: From Antiquity to the Present*, (New York, NY: Cambridge University Press, 2012)

Beate Rudolf and Andrea Eriksson, 'Women's rights under international human rights treaties: Issues of rape, domestic slavery, abortion, and domestic violence', *International Journal of Constitutional Law*, (2007), 5(3), 507-25

Philip N. S. Rumney, 'In Defence of Gender Neutrality Within Rape', *Seattle Journal for Social Justice*, (2007), 6(1), 481-526

John Ruskin, 'Of Queens Gardens', *Sesame and Lilies*, (London: George Allen, 1865)

Sandy Ruxton (ed.), *Gender Equality and Men: Learning from Practice*, (Oxford, Oxfam: 2004)

S

Susana SáCouto, Leila Nadya Sadat and Patricia Viseur Sellers, 'Collective criminality and sexual violence: Fixing a failed approach', *Leiden Journal of International Law*, (2020), 33(1), 207-41

Edward W. Saïd, *Reflections On Exile: And Other Literary And Cultural Essays*, (London: Granta Books, 2001)

Victoria Sanford, Katerina Stefatos and Cecilia Salvi (eds), *Gender Violence in Peace and War: States of Complicity*, (New Brunswick, NJ: Rutgers University Press)

Timothy Andrews Sayle, *Enduring Alliance: A History of NATO and the Postwar Global Order*, (Ithaca and London: Cornell University Press, 2019)

Michael Scarce, *Male on Male Rape: The Hidden Toll of Stigma and Shame*, (New York, NY: Perseus Books, 1997)

William A. Schabas, *An Introduction to the International Criminal Court: Fifth Edition*, (Cambridge, Melbourne, Delhi and New York, NY: Cambridge University, 2017)

Niels Nagelhus Schia, *Franchised States and the Bureaucracy of Peace*, (Cham: Palgrave MacMillan, 2018)

Benjamin N. Schiff, *Building the International Criminal Court*, (New York, NY: Cambridge University Press, 2008)

D. Schindler and J. Toman, *The Laws of Armed Conflicts*, (Leiden: Martinus Nijhoff Publishers, 1988)

Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law', *American Journal of International Law*, (2007), 101(1), 121-40

Robin May Schott (ed.), *Feminist Interpretations of Immanuel Kant*, (Pennsylvania, PA: Pennsylvania State University Press, 1997)

Philipp Schulz, 'Displacement from gendered personhood: sexual violence and masculinities in northern Uganda', *International Affairs*, (2018), 94(5), 1101-19

George Ryley Scott, *The History of Torture Throughout the Ages*, (New York, NY and Oxon: Routledge, 2003)

Joan W. Scott, 'Gender: A Useful Category of Historical Analysis', *American Historical Review*, (1986), 91(5), 1053-75

Jocelyne Scutt, 'Consent in Rape: the Problem of the Marriage Contract', *Monash University Law Review*, (1977), 3(4), 255-88

Patricia Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape', *Case Western Reserve Journal of International Law*, (2002), 34(3), 287-303

Oliver Sensen, *Kant on Human Dignity*, (Walter de Gruyter GmbH and Co. KG: Berlin, 2011)

Arvind Sharma, *Hindu Narratives on Human Rights*, (Santa Barbara, CA: Praeger, 2010)

Justine Sharrock, *Tortured: When Good Soldiers Do Bad Things*, (Hoboken, NJ: Wiley, 2010)

Stephen Shatz and Naomi Shatz, 'Chivalry is Not Dead: Murder, Gender, and the Death Penalty', *Berkeley Journal of Gender, Law and Justice*, (2012), 27(1), 64-110

Laura J. Shepherd, *Gender, UN Peacebuilding and the Politics of Space: Locating Legitimacy*, (Oxford: Oxford University Press, 2017)

Laura J. Shepherd, 'Sex, security and superhero(in)es: From 1325 to 1820 and beyond', *International Feminist Journal of Politics*, (2011), 13(4), 504-21

Dale Spender, *Man Made Language*, (Abingdon: Routledge, 1980)

Gabrielle Simm, *Sex in Peace Operations*, (Cambridge and New York, NY: Cambridge University Press, 2013)

Sandesh Sivakumaran, 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict', *International Review of the Red Cross*, (2010),

92(877), 259-77

Sandesh Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', *Human Rights Quarterly*, (2005), 27(4), 1274-306

Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', *European Journal of International Law*, (2007), 18(2), 253-76

Laura Sjoberg, 'Agency, Militarized Femininity and Enemy Others: Observations From The War In Iraq', *International Feminist Journal of Politics*, (2007), 9(1), 82-101

Laura Sjoberg and Caren E. Gentry, *Mothers, Monsters, Whores: Women's Violence in Global Politics*, (London: Zed Books, 2007)

Laura Sjoberg and Caron E. Gentry (eds), *Women, Gender, and Terrorism*, (London and Athens: University of Georgia Press, 2011)

Inger Skjelsbæk and Dan Smith (eds), *Gender, Peace and Conflict*, (London: Sage, 2001)

Inger Skjelsbæk, 'Sexual Violence and War: Mapping Out a Complex Relationship', *European Journal of International Relations*, (2001), 7(2), 211-37

Inger Skjelsbæk, *The Political Psychology of War Rape: Studies from Bosnia and Herzegovina*, (Oxon and New York, NY: Routledge, 2012)

Philip Smith, *Punishment and Culture*, (Chicago, IL and London: University of Chicago Press, 2008)

Christina Hoff Sommers, *Who Stole Feminism?: How Women have Betrayed Women*, (London: Simon and Schuster, 1994)

Thomas W. Spahr, *Occupying For Peace, The U.S. Army In Mexico, 1846-1848*, unpublished Dissertation presented in Partial Fulfilment of the Requirements for the Degree Doctor of Philosophy in the Graduate School of The Ohio State University, Ohio State University, (2011)

Irma Specht, 'Gender, Disarmament, Demobilization and Reintegration and Violent Masculinities', in Instituto da Defesa Nacional, *Gender Violence in Armed Conflicts*, (Lisbon: Instituto da Defesa Nacional, 2013), 61-90

Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A critique of the 'Principle of Distinction*, (Oxon and New York, NY: Routledge, 2019)

Roger Sullivan, *Immanuel Kant's Moral Theory*, (New York, NY and Melbourne: Cambridge University Press, 1995), p.197.

Herbert Sussman, *Masculine Identities. The History and Meanings of Manliness*, (Santa Barbara, CA: Praeger, 2012)

Richard H. Steinberg, *Contemporary Issues Facing the International Criminal Court*, (Leiden: Brill Nijhoff, 2016)

Kim Stevenson, 'Not Just the Ideas of a Few Enthusiasts': Early Twentieth Century Legal Activism and Reformation of the Age of Sexual Consent', *Cultural and Social History*, (2017), 14(2), 219-36

Kim Stevenson, 'Outrageous Violations: Enabling Students to Interpret Nineteenth Century Newspaper Reports of Sexual Assault and Rape', *Law, Crime and History*, (2014), 1(4), 36-61

Kim Stevenson, 'Unearthing the Realities of Rape: Utilising Victorian Newspaper Reportage to Fill In the Contextual Gap', *Liverpool Law Review*, (2007), 28(3), 405-23

Kim Stevenson, 'Unequivocal Victims: The Historical Roots of the Mystification of the Female Complainant in Rape Cases', *Feminist Legal Studies*, (2000), 8(3), 343-66

Kim Stevenson, Anne Davies and Michael Gunn, B*lackstone's Guide To The Sexual Offences Act 2003*, (Oxford: Oxford University Press, 2004)

Alexandra Stiglmayer (ed.), *Mass Rape: The War Against Women in Bosnia-Herzegovina*, (Lincoln, NA and London: University of Nebraska Press, 1994)

Hung-En Sung, *The Fragmentation of Policing in American Cities: Toward an Ecological Theory of Police-citizen Relations*, (London and Westport, CT: Greenwood Publishing, 2002)

Mia Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda*, (Johannesburg: Bakwena Printers, 2016)

T

Sanne Taekema and Bart van Klink (eds), *Law and Method, Interdisciplinary Research into Law*, (Tübingen: Mohr Siebeck, 2011)

Fiona Tate, 'Impunity, Peacekeepers, Gender and Sexual Violence in Post-Conflict Landscapes: A Challenge for the International Human Rights Agenda', *Law, Crime and History*, (2015), 5(2), 69-96

Chloe Taylor, *The Culture of Confession from Augustine to Foucault. A Genealogy of the 'Confessing Animal'*, (Abingdon: Routledge, 2010)

Daniel Terris, Cesare P.R. Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, (Waltham, Massachusetts: Brandeis University Press, 2007)

Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, (Cambridge: Cambridge University Press, 2017)

Kimberly Theidon, ‘Reconstructing masculinities: The disarmament, demobilisation and reintegration of former combatants in Colombia’, *Human Rights Quarterly,* (2009) 31(1), 1-34

Tamara L. Tompkins, ‘Prosecuting Rape as a War Crime: Speaking the Unspeakable’, *Notre Dame Law Review*, (1999), 70(4), 845-90

Samuel Totten (ed.), *Plight and Fate of Women During and Following Genocide*: *Volume 7,* (Piscataway, NJ: Transaction Publishers, 2012)

Jessica A. Turchik and Katie M. Edwards, ‘Myths About Male Rape: A Literature Review’, *Psychology of Men and Masculinities*, (2012), 13(2), 211-26

Jessica Turchik, Claire Hebenstreit, and Stephanie Judson, ‘An Examination of the Gender Inclusiveness of Current Theories of Sexual Violence in Adulthood: Recognizing Male Victims, Female Perpetrators and Same-Sex Violence’, *Trauma Violence Abuse*, 17(2), (2016), 133-48

U

Richard Udry, ‘The Nature of Gender’, *Demography*, (1994), 31(4), 561-73

V

A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law, Volume 7,* (Netherlands: Brill, 2003)

Elisa von Joeden-Forgey ‘Genocide and Gender: the uses of Women and Group Destiny’, *Journal of Genocide Research,* (1999), 1(1), 43-63

Sine Vorland Holen and Lotte Vermeij, ‘Combating Conflict- Related Sexual Violence’, *NATO Review Magazine*, (2017)

W

Jeremy Waldron, *Dignity, Rank, and Rights*, (New York, NY: Oxford University Press, 2012)

Thomas Weatherall, *Jus Cogens: International Law and Social Contract*, (Cambridge: Cambridge University Press, 2015)

Gina Marie Weaver, *Ideologies of Forgetting: Rape in the Vietnam War*, (Albany, NY: State University of New York Press, 2010)

Lisa Webley, ‘Stumbling Blocks in Empirical Legal Research: Case Study Research’, *Law and Method*, (2016), (3), 1-21

Phillip Weiner, ‘The Evolving Jurisprudence of the Crime of Rape in International Criminal Law’, *Boston College Law Review*, (2013), 54(3), 1207-37

Jasmine-Kim Westendorf, ‘WPS, CRSV and Sexual Exploitation and Abuse in Peace Operations: Making sense of the missing links’, *LSE Women, Peace and Security*

Working Paper Series, (2017), 9, 1-15

Gerhard Werle and Florian Jessberger (eds), *Principles of International Criminal Law, Third Edition*, (Oxford: Oxford University Press, 2014)

Jeni Whalan, *Dealing with Disgrace: Implementing Resolution 2272 on the Challenges of Sexual Exploitation and Abuse in UN Peacekeeping*, (New York, NY: International Peace Institute, 2017)

John Wharton, *Forming an Epitome of the Law of England; and Containing Full Explanations of Technical Terms and Phrases Thereof, Both Ancient and Modern. Including the Various Legal Terms Used in Commercial Business; Together with a Translation of Latin Law Maxims, and Selected Titles from the Civil, Scotch, and Indian Law*, (London: Stevens and Sons, limited, 1892)

James Boyd White, 'Law as Rhetoric, Rhetoric as Law: the Arts of Cultural and Community Life', *University of Chicago Law Review*, (1985), 52(3), 684-702

Sandra Whitworth, *Men, Militarism and UN Peacekeeping: A Gendered Analysis* (Boulder, CO: Lynne Rienner Publishers, 2004)

Jessica L. Willis and Deborah V. Svoboda, 'Gender, Power and Sexual Violence: A Commentary on "You are Not Your Own:" Rape, Sexual Assault and Consent in Evangelical Christian Dating Books', *Journal of Integrated Social Sciences*, (2014), 4(1), 75-82

Gordon Williams, *A Dictionary of Sexual Language and Imagery in Shakespearean and Stuart Literature: Volume I A-F*, (London and Atlantic Highlands, NJ: The Athlone Press, 1994)

Adrien K. Wing and Sylke Merchán, 'Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America', *Columbia Human Rights Law Review*, (1994), 25(1), 1-48

Richard Ashby Wilson, *Writing History in International Criminal Trials*, (Cambridge: Cambridge University Press, 2011)

Sarah Wilson, *The Origins of Modern Financial Crime: Historical Foundations and Current problems in Britain*, (Abington: Routledge SOLON, 2014)

Riley Witt and Ace Buck, *Women Education in 21st Century*, (Essex: ED-Tech Press, 2019)

Mary Anne Wolf, 'Louisiana's Equal Protection Guarantee: Questions About the Supreme Court Decision Prohibiting Affirmative Action', *Louisiana Law Review*, (1998), 58, 1209-39

Cindy Wood, *Studying Late Medieval History: A Thematic Approach*, (Oxon and New York, NY: Routledge)

Hannah Wright, *Masculinities, conflict and peacebuilding: Perspectives on men through a gender lens*, (London: Saferworld, 2014)

James D. Wright, *International Encyclopedia of the Social and Behavioral Sciences*, (University of North Carolina: Charlotte, NC, 2001)

Y

Dvora Yanow and Peregrine Schwartz-Shea (eds), *Interpretation and Method: Empirical Research Methods and the Interpretative Turn*, (London: Routledge, 2015)

Robert K. Yin, *Case Study Research: Design and Methods*, (Thousand Oaks, CA and London: SAGE, 2009)

Xia Yong, *The Philosophy of Civil Rights in the Context of China*, (Leiden: Martinus Nijhoff Publishers, 2011)

Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization*, (Leiden and Boston, MA: Martinus Nijhoff Publishers, 2012)

Z

Milan Zafirovski, *The Enlightenment and Its Effects on Modern Society*, (Texas, TX: Springer, 2010)

Dubravka Zarkov, 'War rapes in Bosnia: On Masculinity, Femininity and Power of the Rape Victim Identity', *Tijdschrift voor Criminologie*, (1997), 39(2), 140-51

Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals*, (New York, NY: Oxford University Press, 2014)

Hilmi M. Zawati, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity', *Torture*, (2007), 17(1), 27-47

Cathy Zimmerman, *Plates in a Basket will Rattle: Domestic Violence in Cambodia*, (Phnom Penh: The Asia Foundation, 1994)

Gaby Zipfel, '"Let Us Have a Little Fun": The Relationship between Gender, Violence and Sexuality in Armed Conflict Situations', (translated, Karen Bennett), *RCCS Annual Review*, (2013), 5, 32-45

Online Sources

Hussaina J. Abdullah, 'Women and the African Peace and Security Architecture', African Peacebuilding Network Working Paper 12, 2017: https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/women-and-the-african-peace-and-security-architecture.pdf

Melissa Burkley, 'Describing Sexual Assault in a Language Men Can Understand',

Psychology Today, 21 November 2017: https://www.psychologytoday.com/us/blog/the-social-thinker/201711/describing-sexual-assault-in-language-men-can-understand

Collins Dictionary: https://www.collinsdictionary.com/dictionary/english/

Rhonda Copelon, 'Rape and Gender Violence: From Impunity to Accountability in International Law', *Carnagie Council for Ethics in International Affairs*, 5 November 2003: http://www.carnegiecouncil.org/publications/archive/dialogue/2_10/articles/1052.html

Alicia Jasmin, 'Historian uncovers reality of male rape during times of war', News, Tulane University, 12 October 2017: https://news.tulane.edu/news/historian-uncovers-reality-male-rape-during-times-war

Neshmiya Adnan Khan, 'Women's Rights in Islam and Reservations to Convention on the Elimination of All Forms of Discrimination Against Women', *Courting the Law*, 18 February 2016: http://courtingthelaw.com/2016/02/18/commentary/womens-rights-in-islam-and-reservations-to-convention-on-the-elimination-of-all-forms-of-discrimination-against-women/

'Open Debate and Draft Resolution on Women, Peace and Security', What's in Blue, 12 October 2015: https://www.whatsinblue.org/2015/10/open-debate-and-resolution-on-women-peace-and-security.php#

Dianne Otto, 'Feminist Approaches to International Law', Oxford Bibliographies, 2012, (last reviewed 2016): https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0055.xml

Oxford Reference: https://www.oxfordreference.com

Matthew Scott, 'Germaine Greer's "On Rape" – a Review', *Quillette*, 5 November 2018: https://quillette.com/2018/11/05/germaine-greers-on-rape-a-review/

Ukri Soirila, 'Human Dignity and Glory – The Future of Human Rights Discourse?', *Allegra Lab*, (2014): http://allegralaboratory.net/human-dignity-and-glory-the-future-of-human-rights-discourse/

Thinking of Her: 5000 Skirts, Pristina Stadium, Kosovo, https://www.youtube.com/watch?v=8FL3p9nEUHY

'What is moral injury?', Syracuse University, Moral Injury Project: http://moralinjuryproject.syr.edu/about-moral-injury/

Women Peacemakers Program, 'Conciliation Resources and Kingdom of the Netherlands', in *Taking UNSCR 1325 to the Next Level: Report and Recommendations*, Permanent Mission of the Netherlands, Conference Report, 30 October 2013: https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Report%20NY%201325.pdf

Unpublished Printed and Online Papers and Presentations

Augusta DelZotto and Adam Jones, 'Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?', unpublished paper presented to the Annual Convention of the International Studies Association, New Orleans, LA, 23-27 March 2002: http://adamjones.freeservers.com/malerape.htm

Chris Dolan, 'Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict', a briefing paper prepared for the workshop held at the Overseas Development Institute, 14 May 2014

'In Hindsight: Negotiations on Resolution 2467on Sexual Violence in Conflict', What's In Blue, 2 May 2019: https://www.whatsinblue.org/2019/05/in-hindsight-negotiations-on-resolution-2467-on-sexual-violence-in-conflict.php#

International Bar Association's Human Rights Institute, 'Background Paper to the Institute's Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals', unpublished briefing paper, 31 October 2011

Henri Myrttinen, 'From Pillars to Practice: Pushing the boundaries of "Women, Peace and Security"', unpublished paper, LSE Women Peace and Security conference, 29 December 2018

Beth Van Schaack, 'Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda', Human Rights Advocacy Stories, Foundation Press, (2008); Santa Clara University Legal Studies Research Paper No. 08-55